Opinion issued November 26, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00186-CV

KENNETH LEON FRENCH, NANCY JANE FRENCH, AND KAREN LYN FRENCH,
Appellants

V.

TRACY A. GILBERT, JOE M. ENIS, C. SCOTT WONDERLY, AND GILBERT, ENIS & WONDERLY, P.C., Appellees

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On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2005-69079

MEMORANDUM OPINION

Appellants, Kenneth Leon French, Nancy Jane French, and Karen Lyn French, ("the Frenches") appeal the trial court's judgment of dismissal of their malpractice

lawsuit against Tracy A. Gilbert, Joe M. Enis, C. Scott Wonderly, and Gilbert, Enis & Wonderly, P.C. ("the Firm") (collectively "appellees"), filed in Harris County. Upon the motions of Wonderly, Gilbert, and the Firm for abatement, the trial court dismissed the Frenches' case against all appellees without prejudice, so that the parties might resolve their claims in a previously filed action in Montgomery County. We determine whether the trial court abused its discretion in granting the motions to abate and entering the judgment of dismissal.[1]

We affirm.

Background

The Frenches hired appellees to represent them in a lawsuit brought against them in Harris County, by Leroy Moore, for unjust enrichment and conversion and

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[1] The Frenches also present a second issue for review, arguing that any abatement or dismissal should have been rendered only as to their claims against the Firm because the Firm was the only plaintiff in the Montgomery County action. The Frenches provide no citations to the record and no authorities in support of their single sentence of argument under this issue. We hold that this issue has been inadequately briefed on appeal, and we overrule it. *See* TEX. R. APP. P. 38.1(h) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."); *Stephens v. Dolcefino*, 126 S.W.3d 120, 129–30 (Tex. App.—Houston [1st Dist.] 2003), *pet. denied*, 181 S.W.3d 741 (Tex. 2005) (holding challenges waived by lack of adequate briefing). However, we note that a trial court may grant a motion to abate a second action, even when not all of the parties in the second action are parties to the first action, so long as the first action may be amended to bring in all necessary and proper parties. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988).

in eviction actions that they brought against Moore in Harris County (collectively "the Moore litigation"). All claims were ultimately consolidated into one lawsuit in which, after a trial before the court on October 3, 2002, judgment was rendered against the Frenches for damages and attorney's fees and Moore was ordered to vacate the properties that were the subject of the eviction actions. The following events then transpired:

> **June 21, 2005** – The Frenches, through counsel, sent a letter to appellees providing notice of intent to file a lawsuit to collect unspecified damages arising from appellees' legal malpractice, breach of fiduciary duty, negligence, negligent misrepresentation, fraud, and breach of contract related to appellees' representation of the Frenches in the Moore litigation. A return receipt in the record indicates that the letter was received by appellees on June 22, 2005.
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> **June 24, 2005** – The Firm filed a lawsuit against Kenneth and Nancy French in the 284th District Court of Montgomery County[2] ("the Montgomery County action"), cause number 05-06-05720-CV, for recovery of attorneys' fees arising out of legal services provided "regarding various separate lawsuits." The record does not reflect when citation was requested or issued.
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> **October 28, 2005** – The Frenches filed a lawsuit against appellees in the 152nd District Court of Harris County, cause number 2005-69079,("the Harris County action")[3] raising claims of negligence, breach of fiduciary duty, common law fraud, breach of contract, negligent misrepresentation, and violations of the Texas Deceptive Trade

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[2] The offices of the Firm are located in Montgomery County.

[3] The Harris County action is the underlying suit in this appeal.

Practices–Consumer Protection Act.[4]

October 31, 2005 – Citation issued against all appellees in the Harris County action.

November 3, 2005 – Gilbert and the Firm were served with citation in the Harris County action.

November 4, 2005 – Kenneth and Nancy French were served with citation in the Montgomery County action.

November 28, 2005 – Gilbert and the Firm filed an answer in the Harris County action, and Kenneth and Nancy French filed an answer in the Montgomery County action.

On December 5, 2005, Gilbert and the Firm filed a joint, verified motion to abate the Harris County action, asking that the Frenches' action be dismissed, or in the alternative, abated, on the grounds that a prior suit involving the parties was pending in Montgomery County and that no notice had been provided as required by the Deceptive Trade Practices Act–Consumer Protection Act.[5] Attached as an exhibit was an affidavit from Gilbert, which itself included attachments.[6] A notice of

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4 *See* TEX. BUS. & COMM. CODE ANN. §§ 17.41–.63 (Vernon 2002 & Supp. 2008).

5 *See id*. §17.505 (Vernon 2002).

6 Attached to the affidavit were (1) a certified copy of the petition in the Montgomery County action; (2) a letter and a copy of the original answer of Kenneth and Nancy French in the Montgomery County action; (3) a file-stamped copy of the Frenches' original petition in the Harris County action; and (4) the June 21, 2005 notice letter from the Frenches' counsel to appellees, notifying appellees of the Frenches' intent to file a lawsuit.

submission filed by Gilbert and the Firm on that date stated that the motion would be presented to the trial court for submission on December 12, 2005. No response was filed by the Frenches to this motion to abate, or to a later-filed brief in support of this motion.[7] The record does not reflect that any action was taken by the Harris County trial court on December 12, 2005 or that any subsequent submission date was requested by Gilbert and the Firm for this motion.

Another defendant, Wonderly, was served in the Harris County action on July 31, 2006, and his answer was filed on August 21, 2006. On September 20, 2006, Wonderly filed a verified motion to abate the Harris County action, requesting that the action be dismissed or, in the alternative, abated. The motion asserted the right to abatement because no proper notice of suit had been given as required by section 17.505 of the Texas Business and Commerce Code.[8] The motion also argued that

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[7] A brief in support of the motion to abate was filed on December 9, 2005, which asserted that (1) dismissal or abatement was required because a Montgomery County court had dominant jurisdiction due to a previously filed suit; (2) abatement was appropriate due to principles of comity, convenience, and orderly procedure; and (3) abatement was mandated due to lack of the notice required by the Texas Deceptive Trade Practices–Consumer Protection Act.

[8] Section 17.505 provides, in relevant part:

> (a) As a prerequisite to filing a suit seeking damages under [the Deceptive Trade Practices–Consumer Protection Act] against any person, a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental

abatement was required because Montgomery County had dominant jurisdiction due to the prior filing of the Montgomery County action, and it suggested that abatement was appropriate for reasons of comity, convenience, and orderly procedure. Although the motion referenced an attached "Exhibit 'A,'" the affidavit of Wonderly, no attachments to the motion appear in the clerk's record on appeal. A notice of oral

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> anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant. . . .
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> . . .
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> (c) A person against whom a suit is pending who does not receive written notice, as required by Subsection (a), may file a plea in abatement . . . in the court in which the suit is pending.
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> (d) The court shall abate the suit if the court, after a hearing, finds that the person is entitled to an abatement because notice was not provided as required by this section. A suit is automatically abated without the order of the court beginning on the 11th day after the date a plea in abatement is filed under Subsection (c) if the plea in abatement:
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> > (1) is verified and alleges that the person against the suit is pending did not receive the written notice as required by Subsection (a); and
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> > (2) is not controverted by an affidavit filed by the consumer before the 11th day after the date on which the plea in abatement is filed.
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> (e) An abatement under Subsection (d) continues until the 60th day after the date that written notice is served in compliance with Subsection (a).
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> TEX. BUS. & COMM. CODE ANN. § 17.505 (a),(c),(d),(e).

hearing on Wonderly's motion to abate, filed on October 3, 2006, stated that a hearing had been set for October 13, 2006.

On October 12, 2006, the Frenches filed a response to Wonderly's motion to abate, which included a request for a continuance of the October 13 hearing. The Frenches agreed that abatement of the Harris County action for 60 days was appropriate under section 17.505 but argued that (1) because Wonderly was not a party to the Montgomery County action, he could not claim that the Frenches' malpractice claims were compulsory counterclaims against him in that action; (2) the malpractice claims were not compulsory counterclaims in the Montgomery County action because the Harris County action was pending at the time the Frenches were served; (3) Wonderly's motion was not supported by affidavits or by any other admissible evidentiary proof; and (4) abatement was not appropriate on any other basis. The response set out various arguments to demonstrate that the Harris County court was the more appropriate court for the orderly and efficient preparation and trial of the malpractice claims. The Frenches also asserted that, if abatement was granted, it should apply only to the Firm because the Firm was the only plaintiff in the Montgomery County action. Attached as exhibits to the Frenches' response were (1) an affidavit from the Frenches' counsel relating facts, dates, and events relevant to the two actions; (2) an affidavit from Kenneth French also setting forth facts, dates,

and events relevant to the two actions and asserting that all attorneys' fees from appellees that had been billed to the Frenches had been paid in full and no monies were owed by the Frenches to appellees; and (3) a copy of the June 21, 2005 notice letter from the Frenches to appellees and the return receipt associated with that letter.

The record does not reflect whether any hearing on Wonderly's motion took place on October 13, 2006 or on any other date,[9] but on December 5, 2006, counsel for appellees provided an order on "Defendants' Motion to Abate" to the clerk for the 152nd District Court. The trial court signed an order entitled, "Order on Defendants' Motion to Abate," which reads:

> After considering Defendants' Tracy A. Gilbert and Gilbert, Enis & Wonderly, P.C., Motion to Abate, Defendant C. Scott Wonderly's Motion to Abate, and the plaintiffs' response, the Court finds that Defendants' motion should be granted. Therefore:
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> ~~It is ORDERED that all proceedings in this case are ABATED until further order of the court,~~
>
> ~~Or, alternatively:~~
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> It is ORDERED that this case is DISMISSED without prejudice so that the parties may proceed with the first filed action which is styled *Gilbert, Enis & Wonderly, P.C. v. Kenneth French and Nancy French*, Cause No. 05-06-05720-CV.

On December 26, 2006, Enis was served with citation in the Harris County

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[9] No reporter's record was filed in this appeal, the court reporter has informed this Court that no record exists, and the trial court's docket sheet does not indicate that any hearing took place. Appellees make certain factual assertions about a hearing, and events related thereto, but there is no support for these assertions in the record before us.

action. No answer from Enis appears in the record.

On January 9, 2007, the Frenches filed a motion for new trial. The motion stated that affidavits were attached to establish facts not apparent from the record, but no attachments to the motion appear in the clerk's record on appeal. In their motion for new trial, the Frenches asserted that their malpractice claims were not compulsory counterclaims to the Montgomery County action because the Harris County action was pending at the time that the Frenches were served as defendants in the Montgomery County action and that, therefore, the trial court erred in granting Wonderly's motion to abate. The record does not reflect that any hearing was requested, or occurred, on the motion for new trial. No order on the motion for new trial appears in the record.

Dominant Jurisdiction and Pleas in Abatement

In their first issue on appeal,[10] the Frenches challenge the trial court's dismissal

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[10] In their "Summary of the Argument," the Frenches also assert that Wonderly was not a party to the Montgomery County action (which was filed by the Firm, not the attorneys individually) and so should not be allowed to assert that the malpractice claims brought against him in the Harris County action were compulsory counterclaims in the Montgomery County action to which he was not a party. However, this assertion is not actually argued in the Frenches' discussion of either issue, nor are any authorities supporting such an assertion presented, and so we do not consider it. *See* TEX. R. APP. P. 38.1(h); *Petras v. Criswell*, 248 S.W.3d 471, 475 n.1 (Tex. App.—Dallas 2008, no pet.) (noting that issues identified in "Summary of the Arguments" did not correspond to issues identified in "Argument and Authorities" section of brief and holding that, to extent that appellant raised different or additional issues in "Summary

of the Harris County action, arguing that the legal malpractice claims asserted in the Harris County action were not compulsory counterclaims in the Montgomery County action because the Harris County action was pending at the time that the Frenches were served as defendants and required to file an answer in the Montgomery County action, citing to *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 207 (Tex. 1999). They also aver that the Harris County action should not have been abated on any other basis, arguing that the Harris County court was the more appropriate court for the orderly and efficient preparation and trial of the malpractice claims and that there was no necessity, from a procedural standpoint, the needs of the parties, or either court, for an abatement of the Harris County action. The Frenches further assert, citing *Hidalgo v. Surety S&L Ass'n*, 462 S.W.2d 540, 545 (Tex. 1971), that there was no proper evidence to support the motion to abate because Wonderly's verification of the motion to abate is not evidence of the facts stated in the motion.[11]

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of the Arguments," they were waived by failure to provide any argument with appropriate citations to authorities and record to support those contentions).

[11] The Frenches also complain under this issue that the trial court had no basis to make any rulings as to their claims against Enis because there was no evidence before the trial court regarding Enis, Enis had not yet been served at the time of the trial court's ruling on the motions to abate, and Enis had not filed an answer or a motion to abate. The Frenches provide no authority in support of this contention, and we therefore need not address it. *See* TEX. R. APP. P. 38.1(h); *Stephens*, 126 S.W.3d at 129–30. Nevertheless, we note that the trial court had the discretion to abate the Harris County action, notwithstanding the fact that one of the parties had not been served, because the Montgomery

Appellees respond that the malpractice claims were compulsory counterclaims and, even if they were not, the trial court could have granted an abatement on the basis of comity and to avoid a potential conflict of jurisdiction. Appellees also point out that the Frenches never filed a response to Gilbert and the Firm's motion to abate and so the trial court could have properly determined, under Harris County local rules, that the Frenches did not oppose such motion and that this basis would have also supported the trial court's ruling. Finally, appellees assert that there was ample evidence to support the trial court's order even though none was attached to Wonderly's motion to abate because the trial court's order clearly stated that the court considered Gilbert and the Firm's motion that did include attached evidence.[12]

County action could have been amended to bring in all necessary and proper parties. *See Wyatt*, 760 S.W.2d at 247.

[12] Appellees also argue that the judgment should be affirmed because the trial court's ruling could also be sustained under section 17.505 of the Texas Business and Commerce Code (providing for an abatement if proper notice is not provided 60 days prior to filing suit raising claims under Texas Deceptive Trade Practices–Consumer Protection Act). *See* TEX. BUS. & COMM. CODE ANN. § 17.505 (a),(c),(d),(e). However, although it is true that the trial court could have granted an *abatement* on this basis for 60 days following the date of service of written notice, as required by the statute, it would not have the authority under this statute, and under the facts of this case, to grant a *dismissal* of the entire cause—including claims that were not raised under the Texas Deceptive Trade Practices–Consumer Protection Act claims. *See Richardson v. Foster & Sear, L.L.P.*, 257 S.W.3d 782, 785–86 (Tex. App.—Fort Worth 2008, no pet. h.) (discussing under what conditions, and to what extent, trial court may dismiss claims for failure to comply with Texas Deceptive Trade Practices–Consumer Protection Act notice requirements, citing *Hines v. Hash*,

A. Standard of review and applicable law

"As a rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate." *Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001). "[I]n a race to the courthouse, the winner's suit should have dominant jurisdiction," subject to exceptions when its justifications fail.[13] *Id.*

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843 S.W.2d 464, 469 (Tex. 1992) and *Miller v. Kossey*, 802 S.W.2d 873, 874–77 (Tex. App.—Amarillo 1991, writ denied)). Moreover, the trial court's order itself indicates that it was not granted on the Deceptive Trade Practices–Consumer Protection Act abatement ground, but because of the prior pending suit in Montgomery County ("It is ORDERED that this case is DISMISSED without prejudice so that the parties may proceed with the first filed action which is styled *Gilbert, Enis & Wonderly, P.C. v. Kenneth French and Nancy French*, Cause No. 05-06-05720-CV."). Therefore we need not consider whether the trial court's ruling was sustainable under the Deceptive Trade Practices–Consumer Protection Act abatement ground.

Similarly, appellees argue that the Frenches did not preserve error for appellate review because the Frenches' motion for new trial was not sworn or verified, it did not include affidavits, and the Frenches did not request a hearing on it. A motion for new trial was not required to preserve error as to either of the two issues raised in this appeal, and therefore the lack of verification, affidavits, or an evidentiary hearing is immaterial. *See* TEX. R. CIV. P. 324 (a), (b) (stating when motion for new trial must be filed in order to preserve error).

[13] There are exceptions to the rule that the court of the first-filed case should be deemed to have dominant jurisdiction, such as when that court does not have the full matter before it, or when conferring dominant jurisdiction on the first court will delay or prevent a prompt and full adjudication of the dispute, or "when the race to the courthouse was unfairly run." *Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001). Thus, the first-filed rule does not apply if a party's conduct estops him from asserting dominant jurisdiction, if joinder of

A motion to abate is the proper procedure for asserting a claim of dominant jurisdiction. *Tovias v. Wildwood Props. P'ship*, *L.P.*, 67 S.W.3d 527, 529 (Tex. App.—Houston [1st Dist.] 2002, no pet.). "[A] later-filed suit must be abated when there exists a complete identity of parties and controversies between it and an earlier suit"; "[o]therwise, abatement . . . due to the pendency of a prior suit is based on the principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues, matters committed to the sound discretion of the trial court." *Coastal Oil & Gas Corp. v. Garza Energy Trust*, No. 05-0466, 2008 WL 3991029, at *15 (Tex. Aug. 29, 2008) (internal quotations omitted); *Dolenz v. Continental Nat'l Bank of Fort Worth*, 620 S.W.2d 572, 575 (Tex. 1981). We review a trial court's ruling on a motion to abate under an abuse-of-discretion standard. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). An abuse of discretion occurs when a trial court acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). A trial court

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parties is infeasible or impossible, or if the plaintiff in the first case is not intent on prosecuting his claims. *Id.*, citing (*Wyatt*, 760 S.W.2d at 247–48). Whether any exceptions to the rule exist is a fact question, which, if raised, is to be determined by the court in which the plea of abatement has been filed. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *see also In re Henry*, Nos. 01-07-00601-CV & 01-07-00622-CV, 2008 WL 4427525, at *4 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008, no pet. h.) (holding that estoppel is long-established exception to general rule of dominant jurisdiction and, if raised, is fact issue to be determined by trial court in which plea of abatement is filed). The Frenches have never asserted that any of these exceptions apply.

abuses its discretion if it fails to grant a plea in abatement when abatement is mandatory, *Wyatt*, 760 S.W.2d at 248, or when the trial court acts arbitrarily or unreasonably in its ruling when abatement is discretionary. *Dolenz*, 620 S.W.2d at 575.

The granting of a plea in abatement in a later-filed suit is mandatory when "an inherent interrelation of the subject matter exists in two pending lawsuits." *Wyatt*, 760 S.W.2d at 247. In such instances, it is "not required that the exact issues and all the parties be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues." *Id.* "In determining whether an inherent interrelationship exists, courts should be guided by the rule governing persons to be joined if feasible and the compulsory counterclaim rule." *Id.*

The granting of a plea of abatement in a later-filed suit is discretionary when there is a lack of identity between the causes. *Dolenz*, 620 S.W.2d at 575. In such cases, the trial court may grant an abatement "for reasons of comity, convenience and orderly procedure, and in exercise of that discretion, may look to the practical results to be obtained, dictated by a consideration of the inherent interrelation of the subject matter of the two suits." *Id*., (quoting *Timon v. Dolan*, 244 S.W.2d 985, 987 (Tex. Civ. App.—San Antonio 1951, no writ) (internal quotations and citations omitted)).

B. Trial court's ruling and evidence in record

The trial court's order specifically stated that the court considered Gilbert and the Firm's motion to abate, Wonderly's motion to abate, and the Frenches' response in making its ruling. The order does not reflect that any other evidence was considered or that there was any evidentiary hearing. There is no reporter's record on file in this case. We will therefore consider the evidence upon which the trial court relied in this matter[14]—the two motions to abate and any accompanying attachments and the Frenches' response to Wonderly's motion to abate—and we will decide the issues before us on the basis of the clerk's record.[15] *See Michiana Easy*

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[14] We note, accordingly, that the Frenches' contention that the trial court did not have admissible evidence before it to consider in making its ruling is not supported by the record. The trial court had the evidence attached to Gilbert and the Firm's motion to abate, as well as that attached to the Frenches' response. Moreover, the material facts necessary for the resolution of this appeal are not contested by the parties, and the trial court had sufficient evidence to make its determination from the affidavits attached to the Frenches' own response.

[15] The Frenches have requested this Court, should we determine that the trial court considered both motions to abate, to consider both the brief on appeal, and the response filed in the trial court, as being directed toward, and applied to, both motions to abate. We will construe the Frenches' challenges on appeal as challenges to the granting of both Wonderly's motion and that of Gilbert and the Firm and will apply the Frenches' arguments on appeal to both motions. However, we may not retroactively transform the Frenches' response in the trial court to Wonderly's motion to abate into a response that applied below to both Wonderly's motion and to Gilbert and the Firm's motion. In determining whether the trial court abused its discretion, we must consider the record as it existed at the time that the trial court made its ruling. *See Stephens Co. v. J.N.*

Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 782–83 (Tex. 2005).[16]

C. Application of law to facts

The question before us is whether the trial court abused its discretion in granting Gilbert and the Firm's and Wonderly's motions to abate. The language in the order indicates that the trial court granted the motions so that the parties' claims could be resolved in the Montgomery County action, but the order does not state whether the court was granting the motions to abate on the basis of mandatory or discretionary abatement. Accordingly, we will consider both potential grounds that might support the trial court's ruling.

As a preliminary matter, we note that the trial court could have properly abated this cause with a ruling on only one motion to abate. Appellees argue that the Frenches never filed a response to Gilbert and the Firm's motion to abate and that, under the applicable local rule,[17] the trial court had the discretion to consider the

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McCammon, Inc., 144 Tex. 148, 154, 52 S.W.2d 53, 55 (1932) (holding that appellate court reviews ruling of trial court based on record before trial court at time that ruling is made).

[16] For the reasons stated in *Michiana*, we do not apply any presumptions in favor of the trial court's ruling based on the fact that there is no reporter's record before us. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 781–83 (Tex. 2005).

[17] Appellees cite to rule 3.3.2 of the Civil Trial Division of the Harris County District Courts, which states that the failure to file a response may be considered a representation of no opposition. *See* HARRIS CTY. DIST. CIV.

Frenches' failure to file a response as a representation of no opposition. They contend, therefore, that the trial court would not have abused its discretion in granting Gilbert and the Firm's motion in the face of the Frenches' apparent lack of opposition. They also suggest that the Frenches may not now complain of the granting of Gilbert and the Firm's motion because the Frenches took no steps to oppose the motion below. *See Cire v. Cummings*, 134 S.W.3d 835, 844 (Tex. 2004).

The record reflects that there was no response filed to Gilbert and the Firm's motion to abate and no objection lodged below to the granting of said motion. The Frenches' motion for new trial does not complain of the trial court's action in granting Gilbert and the Firm's motion to abate. Accordingly, the Frenches failed to preserve error as to the granting of Gilbert and the Firm's motion to abate, under which grant the trial court could have abated their cause, irrespective of any action on Wonderly's motion. *See* TEX. R. APP. P. 33.1(a)(1); *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 372 (Tex. 1988) ("In order to preserve a complaint for appellate review, a party must have presented a timely request, objection, or motion, stated the specific grounds therefor, and obtained a ruling."). However, even if the Frenches' objections to the granting of Wonderly's motion to abate were to be considered sufficient to preserve their complaint to the trial court's order granting both

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RULE 3.3.2.

Wonderly's and Gilbert and the Firm's motions to abate, we hold that the trial court did not abuse its discretion in granting the motions to abate.

The Frenches' principal argument is that their malpractice claims filed in Harris County were not compulsory counterclaims to the attorneys' fees action.[18] Specifically, they aver that, because the Harris County action was already pending at the time that the Frenches filed their answer in the Montgomery County action, the malpractice claims were not compulsory counterclaims in the Montgomery County action, and so the trial court abused its discretion in granting the motions to abate. *See* TEX. R. CIV. P. 97(a); *Ingersoll-Rand*, 997 S.W.2d at 207 ("[A] counterclaim is compulsory only if: . . . (2) it is not at the time of filing the answer the subject of a pending action . . . .").

The Frenches' argument misconstrues the standards by which a trial court is to make a determination of whether abatement is mandatory under a claim of dominant jurisdiction. In deciding whether abatement is mandatory, a trial court must determine whether there exists "an inherent interrelation of the subject matter" in the two suits. *See Wyatt*, 760 S.W.2d at 247. If so, the granting of a plea of abatement

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[18] It has been held that malpractice claims are compulsory counterclaims to suits for attorneys' fees when they arise out of the same transaction. *Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *CLS Assocs., Ltd. v. A___B___*, 762 S.W.2d 221, 224 (Tex. App.—Dallas 1988, no writ). The Frenches do not contend that the malpractice claims did not arise out of the same transaction as the attorneys' fees claim.

is mandatory, even when there is not already a complete unity of issues and parties between the suits, so long as the claim in the first suit may be amended to bring in all necessary parties and issues. *Id.* In making the required determination of whether an inherent interrelationship exists, the trial court "should be *guided* by the rule governing persons to be joined if feasible and the compulsory counterclaim rule." *Id.* (emphasis added).

The term "guided" indicates that when the claim in the subsequent suit meets all of the elements of a compulsory counterclaim, this factor weighs in favor of a finding that there is an inherent interrelation of the subject matter between the cases. Conversely, when the claim in the subsequent suit meets none of the elements of a compulsory counterclaim, this factor weighs against a finding that there is an inherent interrelation of the subject matter between the two suits. This requirement that the trial court be "guided" by the compulsory counterclaim rule likewise guides our review as to whether a trial court has abused its discretion in determining the question of an inherent interrelationship between two suits. However, it does not establish that a trial court abuses its discretion if it finds that there is an inherent interrelationship between two suits when one or more elements of the compulsory counterclaim rule are not met as to the claim in the second suit.[19] *See Hopkins v. NCNB Texas Nat'l*

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[19] We note that *Ingersoll-Rand Co. v. Valero Energy Corp.*, relied upon by the Frenches, did not involve a ruling on a plea in abatement; *Ingersoll-Rand* dealt

Bank, 822 S.W.2d 353, 355 (Tex. App.—Fort Worth 1992, no writ) ("There is an obvious inherent interrelationship between the issues that required the trial court to sustain NCNB's plea and precludes our finding any abuse of the trial court's discretion . . . . We reject appellants' argument that there can be no inherent interrelationship unless the second suit alleges a compulsory counterclaim to the first."); *accord Chem-Gas Engineers, Inc. v. Texas Asphalt & Refining Co.*, 398 S.W.2d 143, 144–45 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (affirming abatement even though necessary ground for claim in second suit to be considered compulsory counterclaim was not met, namely, "not [being] the subject of a pending action"; holding that Texas Rule of Civil Procedure 97(a) should not be construed so as to allow appellant to nullify its effect by simply filing suit, after being sued, and then asserting that claim in second suit was not compulsory counterclaim because of appellant's subsequently filed second action); 2 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 9.79 (2nd ed. 2003) (discussing compulsory counterclaims).

Thus, in the present case, the trial court had to determine whether an inherent interrelation of subject matter existed in the two suits. *See Wyatt*, 760 S.W.2d at 247.

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with a motion for summary judgment that alleged that a claim was barred by *res judicata* because it was a compulsory counterclaim in a prior suit. 997 S.W.2d 203, 207 (Tex. 1999). The complaint in the case before us, accordingly, is governed by the analysis of *Wyatt*, not that of *Ingersoll-Rand.*

Under the facts in the record before us—assuming, without deciding, that the Frenches' malpractice claim lacked one element necessary for it to be a compulsory counterclaim—we hold that the trial court would not have abused its discretion in determining that an inherent interrelationship existed in the two suits and so would not have abused its discretion in granting the motions to abate on such a ground. *Id.*

Moreover, even where a trial court does not find that an inherent interrelationship exists, it may still order an abatement on the grounds of comity, convenience, and orderly procedures, taking into consideration the practical results to be obtained. *See Dolenz*, 620 S.W.2d at 575. Under the facts in this case, the trial court would not have abused its discretion in granting the motions to abate on such grounds.

We overrule the Frenches' first issue.

D. Trial court's remedy of dismissal, rather than abatement

We note that the trial court, in granting the motions to abate, dismissed the Harris County action without prejudice, rather than abating it. Generally, the proper relief on a motion to abate on the ground of dominant jurisdiction is abatement. *See Garza Energy Trust*, 2008 WL 3991029, at *15 ("We have held that a later-filed suit must be abated . . . [when there is dominant jurisdiction in another court]. Otherwise 'abatement of a lawsuit due to the pendency of a prior suit . . .' [is discretionary]")

(citations omitted); *Del Rio*, 66 S.W.3d at 252 ("As a rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate."); *Wyatt*, 760 S.W.2d at 248 (holding that plea of abatement should have been granted on basis of dominant jurisdiction, reversing judgment of court of appeals, and remanding case to trial court with instructions to vacate its judgment and abate proceedings); *see also generally Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985) ("Pleas in abatement and pleas to the jurisdiction have different objectives and different results. Sustaining a plea to the jurisdiction requires dismissal; sustaining a plea in abatement requires that the claim be abated until removal of some impediment."). However, there is also authority holding that if a party files a plea in abatement, calling the trial court's attention to the pendency of a prior suit involving the same parties and same controversy, the subsequent case "must be dismissed." *Mower v. Bower*, 811 S.W.2d 560, 563 n.2 (Tex. 1991); *Curtis*, 511 S.W.2d at 267.

The Texas Supreme Court has noted the split in authority, but has not resolved it. *See Miles v. Ford Motor Co.*, 914 S.W.2d 135, 139 (Tex. 1995); *see also Gordon v. Jones*, 196 S.W.3d 376, 385 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (discussing split in authority on whether abatement or dismissal is appropriate disposition upon granting of motion to abate on basis of dominant jurisdiction);

Tovias, 67 S.W.3d at 529 (noting that relief available in plea to abatement was abatement and that abatement is proper relief when party asserts dominant jurisdiction in another court); *Texas Automatic Sprinklers, Inc. v. Albert Sterling & Assocs.*, 606 S.W.2d 12, 14 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (discussing abatement verses dismissal).

The Frenches do not complain on appeal that the trial court should have abated, rather than dismissed, the Harris County action, nor do they ask us to modify the order of dismissal to one of abatement.[20] Because no such complaint or request is made, we need not pass on the propriety of the trial court's action in dismissing, rather than abating, the Harris County cause, in response to the motions to abate.

Conclusion

We affirm the judgment of the trial court.

Tim Taft
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

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[20] There was likewise no objection lodged in the trial court that dismissal was not the proper relief on the motions to abate and no complaint raised in the Frenches' motion for new trial regarding the nature of the relief granted on the motions to abate.