

Opinion issued January 11, 2018



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-16-00867-CV

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**FOROUZAN GOODARZI, Appellant**  
V.  
**ROBERT D. CLEMENTS, JR., Appellee**

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**On Appeal from the 412th Judicial District  
Brazoria County, Texas  
Trial Court Case No. 83321-CV**

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**MEMORANDUM OPINION**

This appeal arises from an attorney's suit against a former client to recover his contingency fee. Forouzan Goodarzi appeals the trial court's judgment requiring a sheriff's sale of pieces of her jewelry and awarding her attorney, Robert D. Clements, Jr., \$32,205.31 in fees and expenses. On appeal, Goodarzi contends that

the trial court erred in (1) granting Clements' motion for partial summary judgment and interpreting the parties' contingency-fee contract to include the jewelry's value as part of her "recovery" subject to the contingent-fee apportionment, (2) refusing to grant Goodarzi adequate time to retain new counsel to represent her at trial after Clements withdrew from representing her, and (3) excluding Goodarzi's newly hired attorney from testifying as an expert on attorney's fees. We reverse and remand.

### **BACKGROUND**

Sometime before the end of 2011, Goodarzi procured insurance coverage from Jewelers Mutual Insurance Company for two diamond earrings, a pendant, and a tennis bracelet. The jewelry was stolen from her, and she filed a claim with the insurer. According to the policy's terms, the insurer paid approximately \$148,000 in proceeds to D.M. Diamond Co., which had contracted with Jewelers Mutual to provide replacement jewelry.

D.M. Diamond provided Goodarzi replacement jewelry purportedly worth approximately \$148,000. Goodarzi initially took possession of the jewelry but later returned it, contending that her original jewelry was worth more than the replacement jewelry and that she was entitled to the difference in value.

Goodarzi received a May 7, 2014 letter from D.M. Diamond, signed by Danny Mushin, demanding that she pick up the replacement jewelry as the company had not agreed to store it. The letter warned Goodarzi that if she did not pick up the

jewelry by 4:30 P.M. on May 16, 2014, it would be placed in a box outside the office door.

The record does not divulge exactly what happened next, but the jewelry evidently remained in D.M. Diamond's possession. Goodarzi entered into a contingency-fee contract with Robert Clements, Jr., for his professional legal assistance in resolving the dispute. The July 31, 2014 contingency-fee contract between Goodarzi and Clements authorizes Clements "to represent [Goodarzi] to fully prosecute, litigate and/or compromise and settle all claims" that Goodarzi has

against all necessary, responsible or agreed upon parties arising from, because of or in any way connected to: Jewelry Insurance claim as a result of theft on 12-13-11 against Jeweler's Mutual and Danny Mushin, D.M. Diamonds and all other responsible parties.

The agreement held Goodarzi responsible for paying any costs and expenses incurred and for paying Clements

[a]n amount equal to forty percent (40%) of the value of any recovery by way of settlement, judgment or otherwise achieved or received by the Client(s) in connection with the matter(s) for which the Attorney is hereby retained if such recovery is achieved or received after the filing of any lawsuit . . . .

In an affidavit supporting his motion for partial summary judgment, Clements averred that he proposed to Goodarzi that they "would attempt to recover damages from Jeweler's Mutual, then would try to get her jewelry returned . . . , sell the jewelry, and then finish the suit against the primary defendants D.M. Diamonds and Daniel Mushin."

Acting on behalf of Goodarzi, Clements sued Jeweler's Mutual; D.M. Diamond; and its owner, Danny Mushin, in Harris County district court. Jeweler's Mutual settled Goodarzi's claims for \$20,000.00.

Difficulties arose when Clements sought to obtain possession of the jewelry from D.M. Diamond to have it appraised. Mushin informed Clements that he would be out of town and unable to turn over the jewelry on the date Clements proposed. Clements filed a motion for turnover, and set it for hearing. He also proposed a different date to pick up the jewelry, warning that if it was not turned over on that date, he would amend Goodarzi's pleadings to include a cause of action for conversion. D.M. Diamond then informed Clements that it would not release the jewelry until it received some guidance from the trial court as to how it wanted the evidence preserved in the case.

Ultimately, Clements obtained possession of the jewelry. He had the jewelry appraised and, according to his correspondence with Goodarzi, was ready to sell the jewelry to fund the remaining lost-value claim litigation against D.M. Diamond and Mushin. At that point, however, Goodarzi expressed that she was unwilling to sell the jewelry and, shortly thereafter, stopped communicating with Clements.

Clements demanded that Goodarzi allow him to liquidate the jewelry, but she refused and failed to respond to Clements' repeated efforts to communicate with her about the suit. Based on Goodarzi's failure to cooperate, Clements notified Goodarzi

that he intended to move to withdraw from representing her and urged her to retain new counsel. Clements then filed the motion to withdraw, which the Harris County district court granted. Goodarzi did not recover anything on her claims against D.M. Diamond and Mushin.

Two days after the Harris County district court granted Clements' motion to withdraw, he filed this suit in Brazoria County district court. The suit claimed that Goodarzi had breached the parties' fee agreement. It sought a writ of partition to sell the jewelry and apportionment of the proceeds between Goodarzi and Clements.

Clements moved for partial summary judgment on his claimed interest in the jewelry under the fee agreement. The trial court granted partial summary judgment, ruling that the value of the jewelry was part of Goodarzi's recovery subject to the contingent-fee agreement: "[T]he parties entered into the . . . Contingency Fee Contract made the basis of this suit which assigned forty percent (40%) plus costs to Robert D. Clements, Jr. in the [jewelry] currently in the possession of Robert D. Clements, Jr. and made the basis of this suit."

The remaining claims were tried to a jury. Pertinent to this appeal, the jury found, as to Goodarzi's counterclaim for breach of contract, that

- Clements failed to comply with the contingency-fee contract,
- Goodarzi did not fail to comply with the contingency-fee contract,  
and

- Goodarzi was entitled to \$5,000 in compensation for the damages caused by Clements' breach.

In connection with the partial summary judgment on Clements' breach-of-contract claim, the jury found that

- the fair market value of the jewelry is \$85,500 and
- Clements incurred \$1,483.58 in reimbursable expenses in the Harris County litigation.

The jury also found that Clements failed to comply with the fiduciary duty he owed to Goodarzi, but Goodarzi did not submit a damages issue to the jury or plead for equitable relief on that claim.

The trial court's judgment found that Clements' 40% interest in the jewelry plus reimbursable expenses was \$35,683.58. It then offset this amount by the \$5,000 in damages found by the jury for Goodarzi's breach-of-contract counterclaim. The trial court found that the jewelry was not susceptible to fair and equitable partition in kind and therefore ordered a sheriff's sale. It further ordered that, after deduction of the reimbursable expenses, 40% of the proceeds from the jewelry's sale be paid to Clements as a credit against the amount awarded in the judgment, with the balance paid to Goodarzi.

## DISCUSSION

### A. Standard of review and applicable law

In the dispositive issue in this appeal, Goodarzi contends that the trial court erred in finding as a matter of law that the contingency-fee agreement entitled Clements to a 40% interest in the jewelry. We review de novo a trial court's ruling on a summary judgment. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). To prevail on a traditional summary-judgment motion, the movant bears the burden of proving that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When a plaintiff moves for summary judgment on his own claim, he must prove that he is entitled to judgment as a matter of law on each element of his cause of action. *Cleveland v. Taylor*, 397 S.W.3d 683, 696–97 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005); *Cleveland*, 397 S.W.3d at 697. If the movant meets his burden, the burden then shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *see also Goodyear Tire & Rubber Co. v. Mayes*, 236

S.W.3d 754, 755 (Tex. 2007) (per curiam) (explaining that summary-judgment evidence raises fact question if reasonable and fair-minded jurors could differ in their conclusions in light of all evidence presented). We review the evidence presented in the motion and response in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Fielding*, 289 S.W.3d at 848 (citing *City of Keller*, 168 S.W.3d at 827); *Cleveland*, 397 S.W.3d at 697. We indulge every reasonable inference and resolve any doubts in the nonmovant’s favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002) (citing *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997)); *Cleveland*, 397 S.W.3d at 697.

The usual rules of contract interpretation apply to contingent attorney’s fee contracts. *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428, 437 (Tex. App.—Houston [1st Dist.] 2000, pet. dismiss’d). At the same time, “[b]ecause a lawyer’s fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized.” *Anglo-Dutch Petrol. Int’l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 450 (Tex. 2011). Not every dispute over the contract’s meaning must be resolved against the lawyer, but it is the lawyer’s duty to ensure that the client is informed of all material facts relating to the fee agreement. *See id.* at 450–51. Whether the lawyer has been reasonably clear in conveying that information is determined from the client’s perspective. *Id.* at 451 (citing with approval



RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18.2). Parties may not use parol evidence to create an ambiguity where there is none, nor may they use extrinsic evidence to show that the parties meant something other than what their agreement stated. *Id.* at 451 & nn.15, 16 (citing *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008) (per curiam); *Gannon v. Baker*, 818 S.W.2d 754, 755–56 (Tex. 1991) (per curiam)).

## **B. Analysis**

The contingent-fee agreement is silent as to whether recovery of the jewelry itself was subject to Clements’s 40% interest: it does not mention liquidation of the jewelry, much less require it. Nor is “recovery” defined in the agreement to include a percentage of an appraised value for the replacement jewelry; rather, Goodarzi agreed to pay Clements:

[a]n amount equal to forty percent (40%) of the value of any recovery by way of settlement, judgment or otherwise achieved or received by the Client(s) in connection with the matter(s) for which the Attorney is hereby retained if such recovery is achieved or received after the filing of any lawsuit . . . .

When seeking to apply a contingent-fee recovery to non-monetary interests, like the jewelry in this case, the Supreme Court of Texas has held that “the ‘burden’ is on the lawyer ‘to express in a contract with the client whether the contingent fee will be calculated on non-cash benefits as well as money damages.’” *In re Davenport*, 522 S.W.3d 452, 458 (Tex. 2017) (orig. proceeding) (quoting *Levine v.*

*Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92. 95 (Tex. 2001)). The contingent-fee contract between Goodarzi and Clements thus is ineffective to transfer an interest in Goodarzi's replacement jewelry to Clements.

Neither party contends that the contingent-fee contract is ambiguous. Goodarzi's claim did not concern whether she was entitled to the replacement jewelry but whether she was entitled to an additional amount: she contended that the replacement jewelry's value was less than the amount that the insurer paid to D.M. Diamond on Goodarzi's behalf. The amount at stake, then, was the difference between the value of the replacement jewelry and the amount that, according to Goodarzi, should have been paid on the claim and reflected in the value of the replacement jewelry.

The surrounding circumstances are consistent with this interpretation. Goodarzi initially took possession of the jewelry but returned it to D.M. Diamond when she decided that she had a dispute concerning its value. Later, after D.M. Diamond demanded that Goodarzi take the jewelry back, she consulted with Clements and signed the contingent-fee agreement.

In claiming that he "recovered" the jewelry itself, Clements points to later events showing that D.M. Diamond resisted turning over the jewelry when he requested an independent appraisal. But the parties' correspondence shows that D.M. Diamond's reluctance in turning over the jewelry did not concern whether

Goodarzi had a legal right to its possession—only whether the jewelry would be properly preserved as evidence for trial.

Because the contingent-fee agreement did not expressly set forth that the attorney was taking an interest in the recovery of non-cash benefits, we hold that the trial court erred in including the replacement jewelry's value in calculating Clements' interest under the contingent-fee agreement, and in granting partial summary judgment on that basis.

The trial court included its summary-judgment ruling in the charge, instructing the jury that the contingency-fee contract assigned “forty percent (40%) of the value of any recovery by way of settlement, judgment or otherwise achieved or received by [Goodarzi] plus costs to [Clements] in the two diamonds earrings, pendant, and tennis bracelet currently in the possession of [Clements] and made the basis of this suit.” Because this error was incorporated into the jury instructions, it affected the jury's consideration of the contract claims and damages that were submitted for its consideration, and thus requires reversal of the final judgment. Because reversal is required, we need not consider Goodarzi's remaining appellate challenges to the judgment.

## **CONCLUSION**

We reverse the judgment of the trial court and remand the case for a new trial.

Jane Bland  
Justice

Panel consists of Chief Justice Radack and Justices Higley and Bland.