Opinion issued October 28, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00811-CV

PAMELA Y. HALL, Appellant

V.

U.A. LEWIS AND THE LEWIS LAW GROUP, PLLC, Appellees

On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Case No. 1092770

O P I N I O N

In this case, appellant Pamela Hall sued appellees U.A. Lewis and the Lewis Law Group, PLLC (collectively, "Lewis"), for professional negligence and breach of contract after Hall's underlying property damage lawsuit was dismissed on statute

of limitations grounds. Lewis filed a counterclaim for breach of contract, arguing that Hall failed to pay the entire amount of the initial retainer fee. The trial court held a bench trial, found in favor of Hall on her breach of contract claim, and awarded her $400 in damages. The trial court later granted Lewis's motion for new trial. After a second bench trial, the trial court found that Lewis timely filed Hall's property damage suit within the applicable statute of limitations and Hall breached the parties' legal services contract by failing to pay the full retainer. The trial court awarded Lewis $700 in damages and $640 in attorney's fees.

In five issues on appeal, Hall contends that: (1) the trial court erred by finding that Lewis filed Hall's petition within the statute of limitations; (2) the trial court erred by entering a take-nothing judgment against Hall on her professional negligence claim; (3) the trial court erred by entering judgment in favor of Lewis on Lewis's breach of contract claim; (4) the trial court erred by entering a take-nothing judgment against Hall on her own breach of contract claim; and (5) Hall presented legally sufficient evidence that she suffered more than $400 in damages.

We affirm.

Background

Pamela Hall owns and operates her own company, Hall Enterprises. She works as a subcontractor for a freight company and drives an 18-wheeler truck. On the evening of December 20, 2012, Hall had her truck backed into a loading dock at

Cardinal Health Warehouse in Houston. While Hall's truck was being unloaded, Ernesto Cuardras, a driver for Swift Transportation, attempted to pull into the loading dock. Cuardras, however, was inexperienced and did not know that he had to back into the loading dock instead of pulling into the dock. While Cuardras was trying to maneuver his truck in the dock, he struck the cab of Hall's truck, damaging the hood. Hall was unable to use her truck for several months while it was being repaired. She estimated that she lost around $30,000 in revenue during that time period. She paid $4,000 to the lessor of her truck "to hold [her] contract so that [her] truck wouldn't get repossessed" during the repair period. She also paid around $2,000 for repairs and other expenses not covered by Swift Transportation and its insurance company.

After Hall had difficulty recovering her lost revenue from her insurance company and Swift Transportation's insurance company, she began seeking an attorney to file suit against Swift Transportation. In November 2014, approximately one month before the statute of limitations expired on December 20, 2014, Hall contacted U.A. Lewis and discussed her claim. On December 17, 2014, Hall and Lewis met at Lewis's office and signed a representation agreement. In this agreement, Lewis agreed to represent Hall "in regards to Truck Vehicle Damages and Loss of Income on 12/20/12." Under this agreement, Hall was to pay Lewis a total of $1,500 as an initial retainer in installments. She paid Lewis $400 on

December 17, 2014. The parties' agreement required Hall to pay Lewis $400 by February 17, 2015; $250 by March 17, 2015; $250 by April 17, 2015; and $200 by May 17, 2015. Hall paid Lewis an additional $400 on February 28, 2015, leaving a balance of $700 on the initial retainer. It is undisputed that Hall never paid the remaining $700.

December 20, 2014, the date the statute of limitations expired, was a Saturday. Lewis electronically transmitted Hall's original petition against Swift Transportation, Cardinal Health, and Cuardras to eFileTexas.gov on Monday, December 22, 2014, the next business day. Two days later, on Wednesday, December 24, 2014—Christmas Eve, a State of Texas and Harris County holiday—Lewis received an email from eFileTexas.gov stating that the filing had been rejected by the clerk's office. The email stated that the filing had been rejected for "Incorrect Formatting - TRCP 21(f)(8)" and stated, "Should be only one lead document. Always the original petition. All other pleadings are attachments. Please correct and resubmit." Two days after that, on Friday, December 26, 2014, the next business day, Lewis resubmitted Hall's original petition through eFileTexas.gov. The Harris County District Clerk accepted the petition for filing. Hall's suit was assigned to the 113th District Court.[1]

[1] Hall's original petition against Swift Transportation is not included in the appellate record.

During 2015, Hall and Lewis had difficulty communicating. In September and October 2015, Lewis filed three motions to withdraw. In the second and third motions, Lewis stated that Swift Transportation had served written discovery requests, but Lewis had not been able to reach Hall by phone, email, or first-class mail, and she was unable to complete the discovery requests without communicating with Hall. Lewis stated that she could not "proceed as attorney of record." The district court granted Lewis's motion to withdraw and abated the case for a brief period to allow Hall to retain counsel. Hall was unable to retain new counsel in her case against Swift Transportation.

On December 1, 2015, after Lewis had withdrawn from representing Hall, Swift Transportation moved for summary judgment on the statute of limitations. It argued that the statute of limitations expired on December 20, 2014, but Hall did not file suit until December 26, 2014, and thus her suit was untimely. Hall did not file a response to the summary judgment motion or present any evidence concerning the filing of her suit. The district court granted summary judgment in favor of Swift Transportation "on the basis of the affirmative defense of limitations" and dismissed Hall's claims against it.

Hall then filed suit against Lewis in the Harris County Civil Court at Law Number Four and asserted claims for professional negligence and breach of contract. Hall based both of her causes of action on Lewis's alleged failure to timely file suit

against Swift Transportation. Lewis asserted a counterclaim against Hall, alleging that Hall breached the parties' representation agreement by failing to pay the remainder of the initial retainer fee.

The trial court first held a bench trial on the parties' claims in January 2019. On February 20, 2019, the trial court signed a final judgment in favor of Hall on Hall's breach of contract claim and on Lewis's breach of contract claim. The trial court awarded Hall $400 in damages.

Both Hall and Lewis filed timely motions for reconsideration and, alternatively, for a new trial. Hall sought a new trial on the quantum of damages, arguing that she presented evidence that she had suffered at least $40,000 in damages. Lewis, in her motion for new trial, asserted that she had timely filed suit against Swift Transportation.

The trial court did not rule on either party's motion for new trial, and as a result, both motions were overruled by operation of law. At some point, the presiding judge of County Civil Court at Law Number Four left the bench, and a new presiding judge took office. The new presiding judge signed an order granting Lewis's motion for new trial on June 5, 2019.

The trial court held a second bench trial in September 2019. After this trial, the trial court entered a take-nothing judgment against Hall on her claims against Lewis for breach of contract and professional negligence. The trial court found that

Hall breached the parties' contract and awarded Lewis $700 in damages. The trial court also awarded Lewis $640 in attorney's fees under Civil Practice and Remedies Code Chapter 38.

The trial court issued findings of fact and conclusions of law. This appeal followed.

Plenary Power

As an initial matter, we address whether the trial court's June 5, 2019 order granting Lewis's motion for new trial was signed within the trial court's plenary power.[2]

Typically, the trial court's plenary power expires thirty days after the court signs the judgment. *Wells Fargo Bank, N.A. v. Erickson*, 267 S.W.3d 139, 148 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.). Rule of Civil Procedure 329b governs the time for filing certain post-judgment motions. For a motion for new trial to be timely, it must be filed within thirty days after the trial court signs the judgment. TEX. R. CIV. P. 329b(a). If the trial court does not rule on a timely-filed motion for

[2] Although Hall does not raise a specific appellate issue concerning the trial court's plenary power, she does state in her brief that the trial court signed the order granting the new trial "after the expiration of the Trial Court's plenary power." Because orders signed after a trial court loses plenary power are void, thus implicating the trial court's subject-matter jurisdiction, we address this issue. *See State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam) ("Judicial action taken after the court's jurisdiction over a cause has expired is a nullity."); *In re T.G.*, 68 S.W.3d 171, 177 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) ("Judicial action taken after the trial court's plenary power has expired is void.").

new trial by written order within seventy-five days after the judgment was signed, the motion "shall be considered overruled by operation of law on expiration of that period." TEX. R. CIV. P. 329b(c).

If a party has timely filed a motion for new trial, the trial court has plenary power to grant a new trial "until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first." TEX. R. CIV. P. 329b(e). Thus, in situations in which a party timely files a motion for new trial and the motion is overruled by operation of law seventy-five days after the trial court signs the judgment, the court has plenary power for an additional thirty days—or until 105 days after the judgment was signed—in which it can grant a new trial. *See Wells Fargo Bank*, 267 S.W.3d at 149; *Martin v. Tex. Dep't of Family & Protective Servs.*, 176 S.W.3d 390, 392 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see also Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000) (stating that motion for new trial filed "within the initial thirty-day period extends the trial court's jurisdiction over its judgment up to an additional seventy-five days, depending on when or whether the court acts on the motions"); *Emerald Oaks Hotel/Conference Ctr., Inc. v. Zardenetta*, 776 S.W.2d 577, 578 (Tex. 1989) (per curiam) (holding same in context of motion to reinstate under Rule of Civil Procedure 165a, which follows similar timelines).

The trial court first held a bench trial in this case in January 2019. The then-presiding judge, the Honorable William McLeod, signed a final judgment in favor of Hall on her breach of contract claim on February 20, 2019. On March 22, 2019, Hall moved for reconsideration or, in the alternative, for a partial new trial on the quantum of damages. On that same day, Lewis filed a motion to reconsider or, in the alternative, a motion for a "full and complete new trial." At some point, Judge McLeod left the bench. On June 5, 2019, the new presiding judge, the Honorable Lesley Briones, signed an order granting Lewis's motion.

Here, both Hall and Lewis filed motions for reconsideration or, alternatively, motions seeking a new trial on March 22, 2019, thirty days after the trial court signed the final judgment. These motions for new trial were timely filed. *See* TEX. R. CIV. P. 329b(a). The trial court did not sign a written order on these motions, and therefore they were overruled by operation of law seventy-five days after the court signed the final judgment, or on May 6, 2019. *See* TEX. R. CIV. P. 329b(c). Under Rule 329b(e), because motions for new trial were timely filed, the trial court retained plenary power to grant a new trial until thirty days after the motions for new trial were overruled by operation of law, or until June 5, 2019. *See* TEX. R. CIV. P. 329b(e). The trial court signed the order granting a new trial on June 5, 2019, 105 days after signing the final judgment and the day its plenary power expired.

We hold that the trial court signed the order granting Lewis's motion for new trial within its plenary power, and therefore this order, as well as all subsequent orders, is not void. *See Wells Fargo Bank*, 267 S.W.3d at 149.

Timeliness of Petition in Previous Lawsuit

In her first issue, Hall argues that the trial court erred when it found that Lewis did not file Hall's petition after the statute of limitations had run. In her second issue, she argues that the trial court erred when it entered a take-nothing judgment against her on her professional negligence claim against Lewis.

A. Standard of Review

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury's verdict. *HTS Servs., Inc. v. Hallwood Realty Partners, L.P.*, 190 S.W.3d 108, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.). We therefore review the trial court's findings for legal and factual sufficiency using the same standards that we use to review a jury verdict. *Tex. Outfitters Ltd. v. Nicholson*, 572 S.W.3d 647, 653 (Tex. 2019); *HTS Servs.*, 190 S.W.3d at 111. When there is a complete reporter's record, findings of fact are not conclusive, and they are binding only if supported by the evidence. *HTS Servs.*, 190 S.W.3d at 111.

If a party attacks the legal sufficiency of an adverse finding on an issue on which the party bears the burden of proof, the party must demonstrate on appeal that the evidence conclusively established all vital facts in support of the issue. *Id.* In

reviewing this challenge, we examine the record for evidence that supports the challenged finding, ignoring evidence to the contrary. *Id.* If no evidence exists to support the finding, we examine the entire record to determine whether the contrary proposition is established as a matter of law. *Id.* We credit evidence favorable to the finding if a reasonable factfinder could do so and disregard contrary evidence unless a reasonable factfinder could not. *Thompson v. Smith*, 483 S.W.3d 87, 93 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We consider the evidence in the light most favorable to the finding, and we indulge every reasonable inference that would support the finding. *Thompson*, 483 S.W.3d at 93 (citing *City of Keller*, 168 S.W.3d at 822).

When conducting a factual sufficiency review, we consider all the evidence in a neutral light. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam); *Woods v. Kenner*, 501 S.W.3d 185, 196 (Tex. App.—Houston [1st Dist.] 2016, no pet.). We will reverse only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Dow Chem. Co.*, 46 S.W.3d at 242; *Woods*, 501 S.W.3d at 196.

In a bench trial, the trial court is the sole judge of the witnesses' credibility, and the court may choose to believe one witness over another. *Woods*, 501 S.W.3d at 196 (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003), and *Zenner v. Lone Star Striping & Paving, L.L.C.*, 371 S.W.3d 311, 314

(Tex. App.—Houston [1st Dist.] 2012, pet. denied)). We may not substitute our judgment for that of the trial court. *McKeehan v. Wilmington Sav. Fund Soc'y, FSB*, 554 S.W.3d 692, 698 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Woods*, 501 S.W.3d at 196.

We review de novo a trial court's conclusions of law, and we will uphold them on appeal if the judgment can be sustained on any legal theory supported by the evidence. *HTS Servs.*, 190 S.W.3d at 111; *see BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

B. Professional Negligence

To prove a professional negligence claim, the client must establish that: (1) the lawyer owed a duty of care to the client; (2) the lawyer breached that duty; and (3) the lawyer's breach proximately caused damage to the client. *Rogers v. Zanetti*, 518 S.W.3d 394, 400 (Tex. 2017); *Stanfield v. Neubaum*, 494 S.W.3d 90, 96 (Tex. 2016). The issue in a legal malpractice action is whether the attorney exercised that degree of care, skill, and diligence as lawyers of ordinary skill and knowledge commonly possess and exercise. *Newton v. Meade*, 143 S.W.3d 571, 574 (Tex. App.—Dallas 2004, no pet.); *see Murphy v. Gruber*, 241 S.W.3d 689, 692–93 (Tex. App.—Dallas 2007, pet. denied) ("Professional negligence, or the failure to exercise ordinary care, includes giving a client bad legal advice or otherwise improperly representing the client."). When the client claims that the lawyer

improperly represented her in another case, the client must prove and obtain findings as to the amount of damages that would have been recoverable and collectible if the lawyer had properly prosecuted the other case. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009).

A legal malpractice action sounds in tort and is governed by negligence principles. *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996). Breach of a duty proximately causes an injury if the breach is a cause in fact of the harm and the injury was foreseeable. *Stanfield*, 494 S.W.3d at 97. Cause in fact requires proof that the negligent act or omission was a substantial factor in bringing about the harm and that but for the negligent act or omission, the harm would not have occurred. *Id.* (quoting *Akin Gump*, 299 S.W.3d at 122). If a negligent act or omission merely creates the condition that makes the harm possible, then, as a matter of law, it is not a substantial factor in causing the harm. *Id.* (quoting *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 800 (Tex. 2004)). A plaintiff proves foreseeability by establishing that a person of ordinary intelligence should have anticipated the danger created by the negligent act or omission. *Id.*

C. Whether Lewis Timely Filed Hall's Original Petition

Hall argues that Lewis committed professional negligence by failing to timely file the original petition in the underlying property damage case. Lewis argues that

she filed the petition timely under the Rules of Civil Procedure applicable to electronic filing of documents. We agree with Lewis.

The applicable statute of limitations for damage to personal property is two years. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a); *Barr v. AAA Tex., LLC*, 167 S.W.3d 32, 38 (Tex. App.—Waco 2005, no pet.) ("The statute of limitations for negligence claims involving damage to personal property is two years."). Here, it is undisputed that the underlying accident involving Hall's truck occurred on December 20, 2012. The two-year statute of limitations therefore expired on December 20, 2014. *See Medina v. Lopez-Roman*, 49 S.W.3d 393, 398 (Tex. App.—Austin 2000, pet. ref'd) ("[U]sing the measure of a calendar year, we look to the date upon which the event occurred and then look at the calendar to find the same date, two years later, to determine the expiration of the statute of limitations.").

December 20, 2014, however, was a Saturday. "If the last day of a limitations period under any statute of limitations falls on a Saturday, Sunday, or holiday, the period for filing suit is extended to include the next day that the county offices are open for business." TEX. CIV. PRAC. & REM. CODE § 16.072; *see also* TEX. R. CIV. P. 4 ("The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday."). Because December 20, 2014—the last day of the applicable limitations period for Hall's property damage claim—

fell on a Saturday, the time period for filing suit was extended to include the next day the county offices were open for business: Monday, December 22, 2014.

Hall acknowledges that Lewis "attempted" to file suit on Monday, December 22, 2014, but argues that because the filing was later rejected by the district clerk's office for failing to comply with formatting requirements and was not completed until Friday, December 26, 2014, Lewis did not file Hall's petition with the district clerk before the statute of limitations expired.

This argument fails to consider Texas Rule of Civil Procedure 21(f), which was adopted in 2014 and governs the electronic filing of documents. Rule 21(f) provides that "[u]nless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An electronically filed document is *deemed filed when transmitted to the filing party's electronic filing service provider*," with two exceptions not relevant here. TEX. R. CIV. P. 21(f)(5) (emphasis added). Rule 21(f) also identifies several formatting requirements for electronically filed documents, such as requiring that the document "be in text-searchable portable document format (PDF)." TEX. R. CIV. P. 21(f)(8). The rule further provides that the clerk "may not refuse to file a document that fails to conform with this rule," but the clerk "may identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format." TEX. R. CIV. P. 21(f)(10).

In the years since the promulgation of Rule 21(f), several intermediate appellate courts have uniformly held that the electronically filed document was deemed filed when it was successfully transmitted to the party's electronic service provider, even if the filing was not accepted due to a technical error, the filing party canceled the electronic filing before the document was received by the clerk, or the document was never forwarded to the clerk. *See NA Land Co. v. State*, 624 S.W.3d 671, 674–75 (Tex. App.—Houston [14th Dist.] 2021, no pet. h.) (holding that objection to condemnation award was timely filed when objection was submitted to service provider on last day for filing but was not accepted due to technical outage); *Cummings v. Billman*, — S.W.3d —, No. 02-20-00034-CV, 2020 WL 938172, at *2–4 (Tex. App.—Fort Worth Feb. 27, 2020, no pet.) (holding that motion to reinstate was timely filed for purposes of extending appellate deadlines even though plaintiffs' counsel canceled filing before clerk had officially received filing); *High Rev Power, L.L.C. v. Freeport Logistics, Inc.*, No. 05-13-01360-CV, 2016 WL 6462392, at *3 (Tex. App.—Dallas Oct. 31, 2016, no pet.) (mem. op.) (holding that motion for new trial was timely filed for purpose of extending appellate deadlines "when it was successfully transmitted to the company's electronic service provider," but was never forwarded to county clerk).

In *Cummings*, the Fort Worth Court of Appeals stated that Rule 21(f)(5) "is the electronic equivalent of the mailbox rule—that a document is considered filed

when it is deposited into an official United States Postal Service mailbox, not when the clerk receives it in the mail . . . .” 2020 WL 938172, at *2; *see* TEX. R. CIV. P. 5 (“If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time.”). Like the mailbox rule, Rule 21(f)(5) provides that a document is deemed filed “at the moment” counsel transmits the document through eFileTexas.gov, but “[u]nlike the mailbox rule, Rule 21(f)(5) has no requirement that the clerk actually receive the document within any particular period of time.” *Cummings*, 2020 WL 938172, at *2.

Similarly, in *NA Land Co.*, the Fourteenth Court of Appeals recently stated that whether the clerk receives a document before a filing deadline “makes no difference under the rules for determining when an electronically submitted document is filed” because under Rule 21(f)(5) “[a] document is filed when it is submitted to an electronic filing service provider, not when it is received by the clerk.” 624 S.W.3d at 674. “[W]hether the clerk received and rejected the document is not dispositive” of the question whether the document was timely filed. *Id.* at 675. In each of these cases, the courts held that the documents were deemed filed at the time they were successfully transmitted to the electronic filing service provider and

were timely. *See id.*; *Cummings*, 2020 WL 938172, at *2–4; *High Rev Power*, 2016 WL 6462392, at *3.

Here, Lewis electronically filed Hall's petition in the property damage case. The parties presented evidence that the petition was transmitted to eFileTexas.gov at 5:56 P.M. on December 22, 2014, the last day of the limitations period. Lewis received an email from eFileTexas.gov entitled "Filing Submitted," and this email stated, "The filing below has been submitted to the clerk's office for review." Two days later, at 10:11 A.M. on Wednesday, December 24, 2014—Christmas Eve, a State of Texas and Harris County holiday—Lewis received two emails from eFileTexas.gov entitled "Filing Returned." These emails explained that the clerk rejected the filing for "Incorrect Formatting – TRCP 21(f)(8)." One email further stated, "Should be only one lead document. Always the original petition. All other pleadings are attachments. Please correct and resubmit." The other email stated, "This should be an attachment after the original petition. Please correct and resubmit." On Friday, December 26, 2014—the next business day that Harris County offices were open—Lewis resubmitted the original petition to eFileTexas.gov.

The record contains evidence that Lewis successfully transmitted Hall's original petition to the electronic filing service on Monday, December 22, 2014, the day the statute of limitations expired. Under Rule 21(f)(5), the petition was deemed filed at this time. *See* TEX. R. CIV. P. 21(f)(5); *NA Land Co.*, 624 S.W.3d at 674;

Cummings, 2020 WL 938172, at *4; *High Rev Power*, 2016 WL 6462392, at *3. Although the clerk later rejected the document and required Lewis to refile the original petition, Rule 21(f)(5) deems a document filed when it is "transmitted to the filing party's electronic filing service provider," not when it is received and approved by the clerk's office. We conclude that evidence in the record supports the trial court's findings that Lewis timely filed Hall's original petition.

It is undisputed that Swift Transportation moved for traditional summary judgment on Hall's claims against it based on the affirmative defense of limitations. Swift Transportation argued that, under the applicable two-year statute of limitations, Hall had until December 20, 2014, to file suit, but Hall untimely filed her petition on December 26, 2014.[3] The 113th District Court granted summary judgment in favor of Swift Transportation "on the basis of the affirmative defense of limitations." The district court also noted in this order that Hall "did not appear and did not file a response" to the summary judgment motion. By the time Swift Transportation moved for summary judgment in December 2015, the district court had allowed Lewis to withdraw from representing Hall.

[3] The trial court admitted a copy of Swift Transportation's motion for summary judgment. This motion references an Exhibit A—presumably a copy of Hall's petition with a file stamp of December 26, 2014—but this exhibit to the summary judgment motion was not attached to the copy of the motion the trial court admitted and thus does not appear in the appellate record.

Because Hall did not respond to Swift Transportation's summary judgment motion, she was unable to raise a fact issue on limitations by presenting evidence that the original petition was deemed filed on December 22, 2014, the last day of the limitations period, when Lewis electronically transmitted the petition to eFileTexas.gov. Instead, the only evidence before the district court, provided by Swift Transportation, presumably reflected a file stamp of December 26, 2014, outside the limitations period. In the professional negligence case against Lewis, the trial court found that Hall never filed a response to Swift Transportation's summary judgment motion and "failed to provide evidence of timely filing." The trial court concluded that Lewis did not cause any harm to Hall because Lewis timely filed the original petition and the re-submitted petition related back to the original filing. The court found that, instead, Hall caused her own injury by failing to appear or respond to Swift Transportation's summary judgment motion. These findings and conclusions are supported by the evidence in the record.

We hold that the trial court did not err by finding that Lewis timely filed Hall's original petition in the property damage case and by rendering a take-nothing judgment against Hall on her professional negligence claim.

We overrule Hall's first and second issues.

Breach of Contract

In her third issue, Hall contends that the trial court erred by entering judgment in favor of Lewis on Lewis's breach of contract claim. She argues that the damages award of $700 in favor of Lewis would force Hall to pay for legal services that she did not receive. She also challenges the award of $640 in attorney's fees to Lewis. In her fourth issue, Hall argues that the trial court erred by entering a take-nothing judgment against her on her own breach of contract claim.

A. The Parties' Breach of Contract Claims

The essential elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *AKIB Constr. Inc. v. Shipwash*, 582 S.W.3d 791, 806 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *APMD Holdings, Inc. v. Praesidium Med. Prof'l Liab. Ins. Co.*, 555 S.W.3d 697, 707 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A breach of contract occurs when a party fails or refuses to do something it has promised to do. *AKIB Constr.*, 582 S.W.3d at 806. As a general rule, courts have no authority to "determine what fee a litigant should pay his or her own attorney, that being a matter of contract between attorney and client." *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428, 436 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd).

The parties do not dispute that they had a valid contract, and at trial, the trial court admitted a copy of the parties' representation agreement. This hybrid fee agreement required Hall to pay Lewis a $1,500 initial retainer, set out a schedule for payment of the retainer in installments, and assigned a contingency fee interest. Hall paid $400 on December 17, 2014, the day the parties entered into the representation agreement. The contract required Hall to pay $400 by February 17, 2015; $250 by March 17, 2015; $250 by April 17, 2015; and $200 by May 17, 2015. Hall made a second payment of $400 on February 28, 2015. It is undisputed that Hall paid $800 of the $1,500 retainer, but she did not make the payments scheduled for March 2015, April 2015, or May 2015, leaving a balance of $700.

With respect to Lewis's performance under the contract, Lewis presented evidence that she filed an original petition on Hall's behalf and obtained service upon Swift Transportation.[4] Lewis moved to withdraw from representing Hall on September 11, 2015. She filed a second motion to withdraw on September 24, 2015, and a third motion on October 19, 2015. In the second and third motions, Lewis stated that Hall had not responded to phone calls, emails, or first-class mail. Without any communication from Hall, Lewis was unable to answer discovery requests sent

[4] The record does not indicate when Swift Transportation was served, but it filed its original answer on July 14, 2015. Questioning by Hall's counsel suggested that Swift Transportation was served in June 2015.

by Swift Transportation and was unable to "proceed as attorney of record."[5] The district court signed an order granting Lewis's motion to withdraw on November 2, 2015, and abated the proceedings for a month to allow Hall to retain new counsel. Hall did not retain new counsel,[6] and Swift Transportation moved for summary judgment in early December 2015.

The trial court found that Lewis timely filed suit and prosecuted Hall's claim, but Hall failed to pay the retainer agreement in full and owed $700 when the contract was terminated. The court concluded that Lewis was harmed due to Hall's breach because she did not receive "earned compensation bargained for under the terms of the contract." The court awarded Lewis $700—the remaining balance of the retainer—as damages.

We conclude that the trial court's findings on Lewis's breach of contract claim are supported by legally and factually sufficient evidence. The parties had a valid contract. Under this contract, Lewis agreed to represent Hall "in regards to Truck Vehicle Damages and Loss of Income on 12/20/12." Lewis did so by timely filing

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5 Lewis testified that she "withdrew because [Hall] told me that she would not be able to pay," and Hall never protested Lewis's withdrawal. Lewis testified that she did not state in her motions to withdraw that she was withdrawing due to Hall's failure to pay because "[t]hat would prejudice her in her case." The representation agreement states that "THE LEWIS LAW GROUP may withdraw from your representation for non-payment of fees and expenses."

6 After Lewis's withdrawal, Hall consulted with several attorneys, including counsel who eventually represented her in the suit against Lewis, but no attorney entered an appearance on her behalf in the suit against Swift Transportation.

suit on Hall's behalf against Swift Transportation and two other defendants on December 22, 2014. Although Hall paid Lewis $800 of the initial $1,500 retainer, she admittedly did not pay the remaining $700, and Lewis had difficulty communicating with her, leading to Lewis's withdrawal from representing Hall. Lewis therefore presented evidence that she performed or tendered performance under the contract, but Hall breached the contract, causing $700 in damages to Lewis. *See AKIB Constr.*, 582 S.W.3d at 806 (setting out elements of breach of contract cause of action); *Thompson*, 483 S.W.3d at 93 (stating that in legal sufficiency review of trial court's factual findings, we credit evidence favorable to finding if reasonable factfinder could do so). Hall has not presented conflicting evidence demonstrating that the trial court's findings on Lewis's breach of contract claim are against the great weight and preponderance of the evidence. *See Dow Chem. Co.*, 46 S.W.3d at 242 (stating standard for reversing judgment based on factual insufficiency of evidence).

Hall also challenges the trial court's entry of a take-nothing judgment against her on her own breach of contract claim against Lewis. She argues that Lewis breached the contract for legal services by failing to file suit against Swift Transportation within the statute of limitations and by not pursuing the claim on Hall's behalf, instead "spen[ding] the remainder of the time the lawsuit was pending

[attempting] to withdraw from the representation."[7] She argues that this breach of contract by Lewis caused her suit against Swift Transportation to be dismissed on limitations grounds.

We have already held, however, that Lewis timely filed suit against Swift Transportation. We have also held that dismissal of that suit on limitations grounds was not due to Lewis's untimely filing, but due to Hall's failure to respond to Swift Transportation's summary judgment motion—filed after the district court had allowed Lewis to withdraw from representing Hall—and to present evidence that the suit had been timely filed. Hall, therefore, has not established two essential elements of her breach of contract claim: that Lewis breached the contract and that Hall sustained damages as a result of the breach. *See AKIB Constr.*, 582 S.W.3d at 806. We therefore hold that the trial court did not err in entering a take-nothing judgment on Hall's breach of contract claim.[8]

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[7] We note that courts, including this Court, have held that a client may not "fracture" what is essentially a legal malpractice claim into multiple causes of action. *See, e.g.*, *Murphy v. Gruber*, 241 S.W.3d 689, 693–94 (Tex. App.—Dallas 2007, pet. denied); *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Hall's breach of contract claim against Lewis was premised on Lewis's alleged failure to initiate Hall's suit against Swift Transportation before the expiration of the statute of limitations. Although couched as a breach of contract claim, this is effectively a claim challenging the adequacy of Lewis's representation of Hall. *See Greathouse*, 982 S.W.2d at 172 (concluding that client improperly fractured legal malpractice claim into multiple causes of action when crux of each claim was that attorney did not provide adequate legal representation to client).

[8] Because we hold that the trial court did not err by entering a take-nothing judgment against Hall on her breach of contract claim, we need not address Hall's fifth issue,

B. Attorney's Fees

In a portion of her third issue, Hall argues that the trial court erred by awarding Lewis $640 in attorney's fees because Lewis is not entitled to attorney's fees, Lewis did not segregate her fees for prosecuting her own breach of contract claim from the fees for defending against Hall's claims, and Lewis did not present sufficient evidence to justify the reasonableness and necessity of the fees.

In Texas, the general rule is that each party must pay their own attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019). In certain circumstances, however, the prevailing party can recover attorney's fees from the opposing party. *Id.* at 484. When fee-shifting is authorized, whether by statute or by contract, the party seeking attorney's fees must prove the reasonableness and necessity of the requested attorney's fees. *Id.* Civil Practice and Remedies Code section 38.001 is one such statute that allows for fee-shifting, and it provides that a person may recover reasonable attorney's fees from an individual, in addition to the amount of a valid claim, if the claim is for rendered services or an oral or written contract. TEX. CIV. PRAC. & REM. CODE § 38.001(1), (8); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 846 (Tex. App.—Dallas 2014, no pet.) ("To recover attorney's fees under section 38.001, the plaintiff

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whether she presented legally sufficient evidence at trial to establish that she had greater than $400 in actual damages.

must (1) prevail on a cause of action for which attorneys' fees are recoverable and (2) recover damages.").

"[T]he idea behind awarding attorney's fees in fee-shifting situations is to compensate the prevailing party generally for its reasonable losses resulting from the litigation process." *Rohrmoos Venture*, 578 S.W.3d at 487. A law firm can be awarded fees for representation by its own attorney, and attorneys "have been awarded fees for their own pro se representation," although that recovery typically depends upon the language of the particular statute authorizing fee-shifting. *Id.* at 488. In cases involving fee-shifting under section 38.001, a rebuttable presumption exists that "the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable," and the trial court may take judicial notice of the usual and customary attorney's fees and the contents of the case file without receiving further evidence in proceedings before the court. TEX. CIV. PRAC. & REM. CODE §§ 38.003–.004; *Rohrmoos Venture*, 578 S.W.3d at 490.

A claimant seeking attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought. *Rohrmoos Venture*, 578 S.W.3d at 501–02. "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the

reasonable hourly rate for each person performing such services." *Id.* at 502. Contemporaneous billing records are not required to prove the reasonableness and necessity of attorney's fees, but they are "*strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id.*

At trial, Lewis testified as follows concerning attorney's fees:

> I do want to add that my attorney's fees are—they're $350 today, per hour. And at the time of the filing of the suit, I believe they were 320 per hour, at the time of the counter-claim. And I have spent, roughly, including today, I've spent—excuse me—spent roughly 40 hours on this case.[9] And that is from both trials and the hearings and the new trial and the proposed findings of facts and conclusions of law. That is for correspondence with opposing counsel, and I believe that the 350 for breach of contract—I've done—excuse me—I've done, gosh, probably about over 50 breach-of-contract cases. And I've been practicing as an attorney here in Harris County since 2011.
>
> And I believe that that amount—and I will be fair—well, I don't know if it's fair, but 320 an hour is what I would ask for these claims; and I believe that is customary and reasonable for an attorney practicing for 8 years in Harris County, Texas for this type of claim, breach of contract.

Lewis also testified that she would not have filed suit against Hall for breach of contract had Hall not sued her for legal malpractice. She testified that prosecuting this suit had her "away from [her] clients" and "away from [her] practice," and she testified that she had two "appeals due" in the Fifth Circuit and three "from State

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[9] Lewis effectively sought $12,800 in attorney's fees. Forty hours multiplied by $320 per hour equals $12,800.

Court," and she had a summary judgment response due, including one due the day of trial. Hall did not cross-examine Lewis on her hourly rate or on the amount of time she had spent on the case, but she did ask if Lewis had segregated her attorney's fees for prosecuting her own breach of contract claim from her fees for defending against Hall's breach of contract claim. Lewis responded that she had not.

The trial court entered judgment in favor of Lewis on her breach of contract claim against Hall and awarded Lewis $640 in attorney's fees. The trial court found that Lewis testified that she spent forty hours pursuing her breach of contract claim against Hall and that she charges $320 per hour. The court also found that Lewis "testified to the reasonableness and necessity of the fees charged." The court concluded that Lewis was entitled to attorney's fees pursuant to Civil Practice and Remedies Code section 38.001 "for breach of contract and services rendered."

Lewis and her law firm were the prevailing parties on their breach of contract claim against Hall, and they recovered damages. Lewis was therefore entitled to an award of reasonable attorney's fees pursuant to Civil Practice and Remedies Code section 38.001(8). *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8); *Woodhaven Partners*, 422 S.W.3d at 846. Lewis provided testimony—uncontradicted by Hall—that her hourly rate of $320 was customary and reasonable for an attorney in Harris County prosecuting a breach of contract claim. Chapter 38 allows the trial court to take judicial notice of "the usual and customary attorney's fees and of the contents

of the case file" in a proceeding before the court, and a rebuttable presumption exists that "the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable." *See* TEX. CIV. PRAC. & REM. CODE §§ 38.003–.004. Lewis, by testifying that her hourly rate was $320 and that she had spent forty hours working on the case, effectively sought $12,800 in attorney's fees. The trial court awarded her $640, or fees for two hours of work.

Lewis did not provide any documentary evidence to support her request for attorney's fees, such as evidence keeping track of the hours she spent working on the case. However, in light of her uncontested testimony that $320 was a customary and reasonable hourly rate for prosecuting breach of contract cases in Harris County, her appearance before the trial court representing herself and her law firm at trial, her testimony concerning other matters that she needed to attend to in her practice, and the purpose of fee-shifting to "compensate the prevailing party generally for its reasonable losses resulting from the litigation process," *see Rohrmoos Venture*, 578 S.W.3d at 487, we conclude that sufficient evidence supports the trial court's award of $640 in attorney's fees to Lewis and her law firm.

We overrule Hall's third and fourth issues.

Conclusion

We affirm the judgment of the trial court.

April L. Farris
Justice

Panel consists of Justices Kelly, Guerra, and Farris.