

Affirmed and Memorandum Opinion filed August 16, 2011.



In The

**Fourteenth Court of Appeals**

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NO. 14-10-00311-CV

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**DONALD CONRAD LEMPAR, Appellant**

**V.**

**STEPHEN A. NICHOLAS AND PHILIP BOZZO, JR., Appellees**

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**On Appeal from the 73rd District Court  
Bexar County, Texas  
Trial Court Cause No. 2008CI009818**

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**M E M O R A N D U M   O P I N I O N**

Appellant, Donald Conrad Lempar, appeals a summary judgment in favor of appellees, Stephen A. Nicholas and Philip Bozzo, Jr., in Lempar's legal-malpractice case based on appellees' representation of Lempar on several criminal charges. In his sole issue, Lempar contends the trial court erred by denying his motion to stay the present case, including disposition of appellees' motions for summary judgment, pending resolution of Lempar's application for writ of habeas corpus relative to his criminal convictions. We affirm.

## **BACKGROUND**

In 2004, a jury in Bexar County, Texas convicted Lempar of two counts of aggravated sexual assault of a child and two counts of indecency with a child by contact. Appellees represented Lempar on those charges. In light of the criminal district court's rulings concerning the concurrent or consecutive operation of the various sentences assessed by the jury, the court essentially ordered confinement for a total of twenty years. In 2005, the San Antonio Court of Appeals affirmed Lempar's convictions. In 2006, the Texas Court of Criminal Appeals refused his petition for discretionary review. In June 2007, Lempar filed an application for writ of habeas corpus in the criminal district court.

In June 2008, Lempar filed the present legal-malpractice case against appellees alleging they were negligent in their representation of Lempar on the criminal charges. Appellees filed separate but substantially similar motions for summary judgment. Appellees presented a traditional ground, asserting Lempar's criminal conduct was the sole proximate cause of his injuries and damages. Appellees also asserted Lempar had no evidence that (1) he had been exonerated of the criminal charges and (2) appellees' conduct fell below the applicable standard of professional care. Lempar filed both a summary-judgment response and a motion to stay the present case pending resolution of his habeas-corpus proceeding.

On February 10, 2010, the trial court signed a final judgment granting summary judgment on both traditional and no-evidence grounds and ordering that Lempar take nothing. The court also denied Lempar's motion to stay.

## **ANALYSIS**

Lempar does not challenge summary judgment on the merits. Rather, in his sole issue, Lempar challenges the summary judgment by contending the trial court erred by denying his motion to stay.

The elements of a legal-malpractice claim are (1) counsel owed the plaintiff a duty, (2) counsel breached that duty, (3) the breach proximately caused the plaintiff's

injuries, and (4) damages occurred. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995). In *Peeler*, the supreme court held that “plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise.” *Id.* at 497–98. The court cited public policy concerns that convicts should not profit from their illegal conduct and allowing civil recovery for convicts would impermissibly shift responsibility for the crime away from the convict. *Id.* at 498. Therefore, as a matter of law, it is the illegal conduct rather than counsel’s negligence that is the cause in fact of any injuries flowing from the conviction unless it has been overturned. *Id.*

Lempar suggests that ultimately he will be exonerated via the habeas-corpus proceeding and there will be no sole-proximate-cause bar to prosecuting his negligence case against appellees. Therefore, citing *Peeler*, Lempar contends the trial court abused its discretion by adjudicating the motions for summary judgment rather than staying this case pending resolution of the habeas-corpus proceeding.

However, any ultimate exoneration would negate only two of appellees’ three summary-judgment grounds: (1) appellees’ traditional ground was based on the sole-proximate-cause bar; and (2) by stating Lempar had no evidence he had been exonerated of the criminal charges, appellees essentially challenged the proximate cause element of Lempar’s negligence claim by suggesting he was the sole proximate cause of his damages.

As another independent ground, appellees asserted Lempar had no evidence that appellees’ “conduct fell below the applicable standard of professional care,” thereby challenging the breach element of the negligence claim. Disposition of this ground did not depend on whether Lempar is exonerated. Even if Lempar were ultimately exonerated, he would be required to prove appellees breached the standard of care. *See id.* at 496. Exoneration would merely negate the sole-proximate-cause bar to Lempar’s

negligence claim and allow him the opportunity to prove any alleged breach caused his injuries. *See id.* at 497–98.

Therefore, the trial court acted within its discretion by at least considering the no-evidence ground relative to the breach element irrespective of the pending habeas-corpus proceeding. In fact, in his motion to stay and on appeal, Lempar has offered no reason that the trial court should have indefinitely delayed consideration of this no-evidence ground pending resolution of the habeas-corpus proceeding when its outcome would not be dispositive of this ground. Accordingly, Lempar has not negated summary judgment on this no-evidence ground by demonstrating that the trial court abused its discretion by refusing to stay the case. Lempar does not challenge the summary judgment on the merits. Consequently, we must uphold the summary judgment on this no-evidence ground. *Wohlstein v. Aliezer*, 321 S.W.3d 765, 772 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (recognizing appellate court must uphold judgment if appellant does not challenge and negate every ground on which summary judgment could have been granted). Accordingly, we need not decide whether the trial court erred by also granting summary judgment on the grounds that were related to the sole-proximate-cause bar instead of staying consideration thereof pending resolution of the habeas-corpus proceeding. *See id.*

We overrule appellant’s sole issue and affirm the trial court’s judgment.

/s/ Charles W. Seymore  
Justice

Panel consists of Justices Anderson, Seymore, and McCally.