

Affirmed and Memorandum Opinion filed March 14, 2017.



In The

Fourteenth Court of Appeals

NO. 14-15-01096-CV

HASEEB A. BUTT, Appellant

V.

AMEEN ALI, CPA, Appellee

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2012-26411**

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

A member of a limited liability company alleged that a company-hired accountant used the wrong member-ownership percentages in preparing the company's tax returns. The member sued the accountant for breach of contract, breach of the duty of good faith and fair dealing, and negligence. The trial court granted summary judgment in favor of the accountant on all of the claims. We affirm.

I. BACKGROUND

Appellant Haseeb A. Butt is a member, along with Sajid Khan, in Duncanville Real Estate, LLC, a limited liability company formed in late 2007. Butt asserts that he and Khan each own 50% of Duncanville. Appellee Ameen Ali, Duncanville's outside accountant, prepared the company's 2007 tax year return, showing Khan as an 85% member and Butt as a 15% member. When Butt saw that the tax return reflected the 85/15 split, he told Ali that Butt and Khan each owned 50% in Duncanville.

Butt filed suit against Khan in 2010, and the two members later settled the lawsuit. While that lawsuit was pending, Butt asked Ali for information about the 85/15 split, including the documentation Ali received from Khan supporting the 85/15 split and whether Ali had corrected the 2007 year tax return. Butt also asked Ali to provide Butt with the 2008 year tax return, the paperwork used to file the 2007 and 2008 returns, and all the paperwork Khan had provided to Ali to prepare the 2009 return. According to Butt, Ali did not respond to Butt's requests and instead helped Khan by hiding the information Ali had in his possession. Butt later repeated his requests to Ali and, again, Ali did not respond.

Butt filed a complaint against Ali with the Texas State Board of Public Accountancy. According to Butt, Ali responded to the complaint by producing (1) a set of meeting minutes reflecting the 85/15 split and (2) a Small Business Administration loan application Khan had signed reflecting an 85/15 split. In 2012, Butt retained another accounting firm to prepare and file corrected tax returns.

Butt filed suit against Ali, asserting claims for breach of contract, breach of the duty of good faith and fair dealing, and negligence. Ali answered the suit and sought sanctions against Butt, asserting that Butt's suit was groundless, brought in bad faith, and brought for the purpose of harassment because the Accountancy Board

dismissed Butt's complaint with no action having been taken.

No-Evidence Summary Judgment

Ali filed a no-evidence motion for summary judgment, asserting that there was no evidence of the essential elements of Butt's claims for breach of contract, breach of the duty of good faith and fair dealing, and negligence. Butt responded to Ali's no-evidence motion for summary judgment. The trial court granted the motion as to Butt's claims for breach of contract and breach of the duty of good faith and fair dealing, but denied the motion as to the negligence claim.

Traditional Summary Judgment

Twenty months later, Ali filed a traditional motion for summary judgment on Ali's claim for negligence in providing tax and accounting services. Butt did not file a response to Ali's traditional motion for summary judgment, and the trial court granted it, disposing of the only remaining claim. The trial court, observing that Ali's no-evidence motion for summary judgment had been granted on Butt's other claims, rendered a final judgment.

Motion for Reconsideration

Butt filed a motion for reconsideration of the trial court's final summary-judgment order, claiming that he was not served with the traditional motion for summary judgment or any notice of hearing. After a hearing, the trial court denied Butt's motion for reconsideration.

Issues on Appeal

Butt brings the following issues in this appeal:

1. Did the Trial Court err in denying Appellant's Motion for Re-Consideration of "Order granting Final Summary Judgment; dated 10/5-2015 and granting the Plaintiff Jury Trial" of Cause No. 2012-

26411 in the final order dated 12-4-2015 because the evidence conclusively proves as a matter of law that the Appellee was negligent and proximately caused the loss to Appellant as Appellant's personal and business CPA [certified public accountant]?

2. Did the Trial Court err in denying Appellant's Motion for Re-consideration of "Order Granting Final Summary Judgment; dated 10/5-2015 and granting the Plaintiff Jury Trial" of Cause No. 2012-26411 as Appellee was failed to provide sufficient evidence of service of Appellee's "Traditional Motion of Summary Judgment" filed on September 11, 2015 in accordance to rules (21, 21a) of civil procedure rules of Texas[?]

3. Did the Trial Court err in denying Appellant's Motion for Re-Consideration of "Order Granting Final Summary Judgment; dated 10/5/2015 and granting the Plaintiff Jury Trial" as Appellee's first "No-Evidence Motion for Summary Judgment" filed on September 13, 2013 was granted in part and denied in part. Appellee's rehearing motion for said Judgment was denied by Honorable Judge of 61st judicial district Court on April 13, 2015[?]

4. Appellee did not file an appeal against said ruling but filed another "Traditional Motion for Summary Judgment" seeking Judgment against the interlocutory Judgment already passed by the Honorable 61st Judicial District Court.¹

II. STANDARD OF REVIEW

We review the grant of summary judgment de novo. *KCM Fin. KKC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). In a traditional motion for summary judgment, if the movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). We consider all the evidence in the light most favorable to the nonmovant, crediting favorable evidence to the nonmovant if reasonable jurors could, and

¹ Citations to the record omitted.

disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). When, as in this case, the trial court does not specify in the order granting summary judgment the grounds upon which the trial court relied, we must affirm the summary judgment if any of the independent summary-judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

III. ANALYSIS

All of Butt's issues on appeal concern Ali's traditional motion for summary judgment.² We begin with Butt's second issue in which he claims that Ali did not serve him with either the traditional motion for summary judgment on Butt's negligence claim or the hearing notices for that motion.

A. Did Ali use a method of service not permitted by Rule 21a?

Butt asserts that Ali did not serve him with the traditional motion for summary judgment and the hearing notices by personal service, courier delivery, certified mail, or registered mail. Butt, quoting a prior version of Texas Rule of Civil Procedure 21a, claims these are the only authorized means of service. Ali responds

² Butt does not challenge the order granting Ali's no-evidence motion for summary judgment on his claims for breach of contract and breach of the duty of good faith and fair dealing. Therefore, Butt has waived any complaints regarding those claims on appeal. *See San Jacinto River Auth. v. Duke*, 783 S.W.3d 209, 209–10 (Tex. 1990) (per curiam) (stating that it is a well-established rule that grounds of error not assert by points of error or argument in the court of appeals are waived"); *see also Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex. 2007) (per curiam) (holding that the plaintiff waived error on appeal as to summary judgment as to claims for tortious interference with a contract, conspiracy, conversion, and fraud by failing to challenge the trial court's summary judgment on those claims).

to Butt's lack-of-service argument by pointing out that he had served Butt electronically as provided in the current version of Rule 21a. *See* Tex. R. Civ. P. 21a(a)(1) (providing for electronic service). Butt did not address electronic service in the trial court or in his opening appellate brief, but waited until his reply brief to address this means of service. Based on his failure to raise this issue timely, Butt has waived any assertion that Ali did not serve him electronically with the traditional motion for summary judgment and hearing notices. *See Tex. Ear Nose & Throat Consultants, PLLC v. Jones*, 470 S.W.3d 67, 84 n.15 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding argument was waived because it was not raised in trial court, but raised for the first time in a reply brief on appeal).

The only argument Butt fairly presents under his second issue is that Ali failed to serve Butt by the means Butt contends are available under Rule 21a—personal service, courier delivery, certified mail, or registered mail. This argument lacks merit. *See* Tex. R. Civ. P. 21a(a)(1). We overrule Butt's second issue.

B. Did Butt raise a fact issue on standard of care or breach of the standard of care?

In his first issue, Butt contends that the trial court erred in granting summary judgment on his negligence claim. To prevail on a negligence claim, the plaintiff must establish that (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; and (3) that breach proximately caused damages. *HIS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). The threshold inquiry in a negligence case is whether the defendant owes the plaintiff a legal duty. *Centeq Realty v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The plaintiff must establish both the existence and the violation of a duty owed to the plaintiff by the defendant to establish liability in tort. *Greater Houston Transp. Co.*

v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990). Whether a legal duty exists is a question of law for the court to decide from the facts surrounding the occurrence in question. *Military Highway Water Supply Corp., v. Morin*, 156 S.W.3d 569, 572 (Tex. 2005).

Certified public accountants can be held liable for negligence just as other skilled professionals are held liable for negligence. *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 185 (Tex. App.—Waco 1987, writ denied). Certified public accountants owe their clients a duty to exercise the degree of care, skill and competence that reasonably competent members of their profession would exercise under similar circumstances. *Greenstein, Logan & Co.*, 744 S.W.2d at 185; *see also Ling v. BDA&K Servs, Inc.*, 261 S.W.3d 341, 347 (Tex. App.—Dallas 2008, no pet.) (“Accountants as tax preparers owe their clients a common law duty to exercise reasonable care.”). “Expert testimony is usually necessary to establish the requisite standard of care and skill, a departure from that standard, and the causal link between the plaintiff’s damages and the accountant’s negligence.” *Greenstein, Logan & Co.*, 744 S.W.2d at 185; *see FFE Transp. Serv., Inc. v. Fulgham*, 154 S.W.3d 84, 90 (Tex. 2004) (stating that expert testimony is necessary to establish the applicable standard of care “when the alleged negligence is of such a nature as not to be within the experience of the layman”); *Ling*, 261 S.W.3d at 348 (“In a professional malpractice case, the standard of care and the breach of the standard are established by expert testimony.”). Though Butt did not file a response to Ali’s traditional motion for summary judgment, he still may challenge on appeal the sufficiency of Ali’s proof to support summary judgment. *See M.D. Anderson Hosp. & Tumor Inst.*, 28 S.W.3d at 23.

The parties to the contract for accounting services were Ali and Duncanville. Though Butt was not a party to the contract, we presume for purposes of this appeal

that Butt may bring his own action for negligence against Ali. *See Murphy v. Campbell*, 964 S.W.2d 265, 268 (Tex. 1997) (holding that stockholders had standing to maintain negligence claim against corporation's accountants because they could recover damages since accountants counseled the stockholders in addition to the corporation and the stockholders suffered a direct loss and, under the circumstances, had individual claims against the accountants separate from the corporation's claims).

Ali submitted his affidavit in support of his traditional motion for summary judgment, attesting that (1) he is a certified public accountant licensed by the Texas State Board of Accountancy, (2) he has practiced accounting since 1992, and (3) because of his education, training, and experience, he is familiar with the standards of care and of practice required of accountants in Houston, Harris County, Texas. Ali explained that Duncanville engaged his services at the beginning of 2008, to prepare the company's federal and state income tax returns, beginning with the 2007 tax year. Either Khan or Khan's wife, Ayesha Khan, gave Ali the ownership percentages of 85/15. Ali also received a copy of the minutes of company's meeting and the Small Business Administration loan package, through which Duncanville had obtained financing to purchase the car wash business it operated. Both documents reflected the 85/15 split.

The terms of the engagement letter required Duncanville to designate one person "with suitable, skill, knowledge of experience to oversee any accounting services, tax services, or other services" Duncanville designated Khan as "the sole direct contact for Ameen Ali." In his affidavit, Ali explained that when an individual is named as the sole contact for financial information on behalf of an entity, the applicable standard of care requires the certified public accountant to utilize the information provided by that person in preparing the entity's tax returns.

Ali attested that it was reasonable and in compliance with the applicable standard of care for him to rely on the information Khan provided, which included the minutes of the Duncanville meeting and the loan documentation, for the 85/15 split in preparing Duncanville's tax returns.

Based on his education and experience as a certified public accountant, Ali set forth the standard of care for accountants and described how he complied with that standard of care. Butt never designated an expert on the standard of care or proffered any expert-witness evidence on the issue. Even if we were to consider Butt's motion for reconsideration as a response to the traditional motion for summary judgment, without expert testimony, Butt was never in a position to provide the standard of care for accountants or to address whether Ali had breached the applicable standard of care. Therefore, Butt failed to raise a fact issue on the standard of care and any alleged breach of the standard of care. We overrule Butt's first issue.

C. Did the trial court err by granting the traditional motion for summary judgment after it had denied the no-evidence motion for summary judgment on Butt's negligence claim?

In his third and fourth issues, Butt asserts that the trial court erred by granting Ali's traditional motion for summary judgment after the court had denied Ali's no-evidence motion for summary judgment and Ali did not appeal that ruling.

Unless a statutory exception applies, the general rule is that an appeal may be taken only from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see also CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). The trial court's order on Ali's no-evidence motion for summary judgment (granting as to all claims except negligence and denying as to the negligence claim) is an interlocutory order,

not a final judgment. Butt has not cited any authority allowing an interlocutory appeal of the partial denial of his no-evidence motion for summary judgment under the circumstances of this case. Moreover, Butt has not cited, and our research has not revealed any authority barring the trial court from granting a traditional motion for summary judgment after having denied a no-evidence summary judgment motion. We overrule Butt's third and fourth issues.

Having overruled all of Butt's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
 Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Christopher.