Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-13-00239-CV

LAW OFFICE OF OSCAR C. GONZALEZ, INC., and Oscar C. Gonzalez,
Appellants

v.

Isabel **SLOAN**,
Appellee

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2010-CI-14280
Honorable Larry Noll, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: August 31, 2016

REVERSED AND RENDERED IN PART; AFFIRMED IN PART

This case is before us on remand from the Texas Supreme Court for consideration of an issue that was not addressed in our prior opinion.

Isabel Sloan sued attorneys Oscar C. Gonzalez and Eric Turton, as well as the Law Office of Oscar C. Gonzalez, Inc., for misappropriation of $75,000 in settlement proceeds that Turton received on Sloan's behalf and deposited into his trust account. Sloan alleged several causes of action, including negligence and gross negligence, breach of fiduciary duty, money had and received/conversion, and violations of the Deceptive Trade Practices–Consumer Protection Act

(DTPA) against all three defendants, and misapplication and theft against Gonzalez and his Law Office. The jury found in favor of Sloan on all her theories of liability. The jury also made findings that Sloan had an attorney-client relationship with all three defendants, that Gonzalez and the Law Firm were each 30% responsible and Turton was 40% responsible for the negligence that caused Sloan's damages, and that the three defendants were engaged in a joint enterprise and a joint venture with respect to Sloan's underlying case. Sloan elected to recover under the DTPA. Based on the jury's findings, the trial court entered judgment holding that all three defendants were jointly and severally liable to Sloan for $77,500 in actual damages, consisting of $75,000 in misappropriated settlement funds plus forfeiture of the $2,500 retainer paid by Sloan. In addition, the judgment awarded Sloan approximately $400,000 in additional DTPA damages, approximately $200,000 in attorney's fees, plus pre-judgment and post-judgment interest, court costs, and conditional appellate fees. The judgment also imposed a constructive trust on two bank accounts and real estate sale proceeds held by Gonzalez and/or the Law Office.

On the appeal by Gonzalez and the Law Office, we concluded that the essence of Sloan's complaint was a professional negligence claim, and her DTPA and other alternative causes of action were an improper attempt to fracture the legal malpractice claim. *Law Office of Oscar C. Gonzalez, Inc. v. Sloan*, 447 S.W.3d 98, 112 (Tex. App.—San Antonio 2014), *rev'd on other grounds*, 479 S.W.3d 833 (Tex. 2016). After determining the evidence was sufficient to support the jury's finding that Gonzalez and the Law Office were negligent in their failure to safeguard Sloan's settlement proceeds and such negligence caused Sloan's injury, we rendered judgment against them for Sloan's actual damages of $77,500, plus pre-judgment and post-judgment interest, and court costs; we also affirmed imposition of the constructive trust. *Id.* at 114-15, 117. Based on the jury's proportionate responsibility finding, we applied the percentages of responsibility to the judgment against Gonzalez and the Law Office. *Id.*

Sloan filed a petition for review in the Texas Supreme Court asserting we should have addressed the jury's joint enterprise and joint venture findings in our opinion. Upon review, the Supreme Court agreed, and reversed and remanded the case for our consideration of the sufficiency of the evidence to support the joint enterprise and joint venture findings and the legal implications of those findings. *Law Office of Oscar C. Gonzalez, Inc. v. Sloan*, 479 S.W.3d 833, 834-35 (Tex. 2016) (per curiam).

SUFFICIENCY OF THE EVIDENCE: JOINT VENTURE AND JOINT ENTERPRISE

In their brief on remand, Gonzalez and the Law Office argue the evidence is legally and factually insufficient to support the jury's findings that they were engaged in a joint venture and joint enterprise with Turton with respect to the handling of Sloan's case, and that no question concerning any other agency relationship supportive of joint and several liability was submitted to the jury. Sloan replies that the evidence of joint venture and joint enterprise is sufficient, and argues that, based on those findings, Gonzalez and the Law Office are jointly and severally liable for all the damages, including the DTPA damages attributable to Turton's actions.

Standards of Review

In conducting a legal sufficiency review, we consider all the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that supports it, crediting favorable evidence if reasonable jurors could have done so and disregarding contrary evidence unless reasonable jurors could not. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). A legal sufficiency challenge will be sustained when there is a complete absence of evidence of a vital fact or when the evidence offered to prove a vital fact is no more than a scintilla. *City of Keller*, 168 S.W.3d at 827. Evidence is "no more than a scintilla" when it

is "so weak as to do no more than create a mere surmise or suspicion that the fact exists." *Akin, Gump*, 299 S.W.3d at 115 (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

In reviewing for factual sufficiency, we consider and weigh all of the evidence in support of and contrary to the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We must determine whether the evidence in support of the finding is so weak and so against the great weight and preponderance of the evidence that the finding is clearly wrong and manifestly unjust. *Id.* In undertaking this review, we do not substitute our judgment for that of the jury, as they are the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819, 821.

Elements of Joint Venture and Joint Enterprise

A joint venture is a distinct common law entity in Texas which involves a relationship similar to a partnership, but which is typically limited to a particular transaction or enterprise. *Moody v. Betz*, No. 01-96-00220-CV, 1998 WL 394312, at *5 (Tex. App.—Houston [1st Dist.] July 16, 1998, no pet.) (not designated for publication). A joint venture is contractual and must be based on either an express or implied agreement between the participants. *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978). The other essential elements of a joint venture are: (1) a community of interest in the venture; (2) an agreement to share profits of the venture; (3) an agreement to share losses of the venture; and (4) a mutual right of control or management of the venture. *Id.*; *Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184, 186 (Tex. 1981). The burden of proof is on the party seeking to establish the joint venture, and the intention of the parties is the true test. *State v. Houston Lighting & Power Co.*, 609 S.W.2d 263, 267 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). A joint venture does not exist if one of the necessary elements is missing. *See id.* at 268; *see also Coastal Plains*, 572 S.W.2d at 288.

With respect to joint enterprise, Texas has adopted the definition from the Restatement (Second) of Torts, § 491 cmt. c (1965). *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10, 14 (Tex. 1974). Joint enterprise requires proof of four elements: (1) either an express or implied agreement among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that common purpose; and (4) an equal right of control over the enterprise formed to carry out that common purpose. *Id.*; *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 613 (Tex. 2000). The common law theory of joint enterprise makes each party the agent of the other and holds each responsible for the negligent actions of the other. *Able*, 35 S.W.3d at 613 (citing *Shoemaker*, 513 S.W.2d at 14).

The trial court's charge properly submitted these elements to the jury in Question No. 2 (joint enterprise) and Question No. 3 (joint venture). The jury found that Gonzalez and the Law Office engaged in both a joint enterprise with Turton with respect to Sloan's case and a joint venture with Turton which included Sloan's case.

Analysis

As we stated in our prior opinion, Turton had an office in the space owned by Gonzalez/the Law Office and Turton paid his share of rent and overhead expenses. *Sloan*, 447 S.W.3d at 103. "Gonzalez would often originate a case and refer it to Turton to work on, with Gonzalez taking 50% of the fee. On other occasions, Gonzalez and Turton would work on a case together and the fees from such a joint case would be deposited in an 'office account' they shared." *Id.* Turton testified that Gonzalez always set the fee on referred and joint cases, and stated this course of dealing had been in effect since the 1990s. *Id.* Sloan argues that the described course of dealing and fee-splitting arrangement between Gonzalez and Turton on other cases "like Sloan's" during prior years is evidence tending to establish the elements of joint venture and joint enterprise in her particular case. We disagree that such prior arrangements in other cases constitute evidence of a

joint venture or joint enterprise with respect to Sloan's case. The Supreme Court has cautioned that when the evidence shows a complex, on-going relationship between the members of the purported joint enterprise, there may be "several different agreements and understandings between the parties, encompassing an assortment of common purposes, and thus a number of possible projects or 'enterprises' devoted to carrying them out." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 529 (Tex. 1999). "The parties may have a 'community of pecuniary interest' (required by the Restatement's third element) in some of those purposes but not in others," or "the evidence may be equivocal or non-existent as to whether the parties have an equal right to a voice in the enterprise's direction, giving an equal right of control as required by the Restatement's fourth element." *Id.* In such complex relationships, the reviewing court must be careful to focus on the particular enterprise at issue, rather than prior arrangements in other projects between the parties. *Id.* Such is the case here given the lengthy course of dealing between Gonzalez and Turton on both referred cases and joint cases dating back to the 1990s.

Focusing on the evidence concerning Sloan's particular case, we first note that the jury found in Question No. 1 that an attorney-client relationship, either "expressed in an agreement" or "implied from the conduct of the parties," existed between Sloan and Gonzalez/the Law Office. We have previously concluded that the evidence was sufficient to support the finding of an attorney-client relationship as a threshold element for Sloan's professional negligence claim against Gonzalez and the Law Office. *Sloan*, 447 S.W.3d at 107. According to the terms of the written employment contract, Gonzalez, the Law Office, and Turton agreed to represent Sloan in her case in probate court. *Id.* Therefore, the initial and necessary element of an agreement among Gonzalez, the Law Office, and Turton with respect to Sloan's underlying case is met for purposes of both joint venture and joint enterprise. *Coastal Plains*, 572 S.W.2d at 288 (participants must have an express or implied agreement with respect to the subject of the joint venture); *Able*, 35

S.W.3d at 613 (participants in a joint enterprise must agree to a common purpose). Here, the subject of the agreement was the representation of Sloan.

With respect to the other elements of joint venture and joint enterprise, even assuming arguendo the evidence was sufficient to establish a community of pecuniary interest and an agreement to share profits and losses in the Sloan matter, there was no evidence to prove the last element of each theory — that Gonzalez and the Law Office had a mutual or equal right of control with Turton over the handling of Sloan's probate case. For purposes of a joint venture, the participants need only have a "mutual right of control" over the venture, which may or may not be equal. *See Moody*, 1998 WL 394312, at *7 (division of voting power between participants of 51% and 49% showed a mutuality of control). A joint enterprise requires an "equal right of control" between the participants, which means that each party must have "an authoritative voice" or must have "some voice and right to be heard," not merely "some" control or a general right of control. *Able*, 35 S.W.3d at 614 (citing *Shoemaker*, 513 S.W.2d at 16); *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995); *see Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993) (general right of control was insufficient to make defendant responsible for actor's criminal conduct in premises liability action). In *Triplex*, the court held there was insufficient evidence of an "equal right of control" necessary to establish a joint enterprise where there was no evidence the radio station had a voice in, or the equal right to control, the nightclub's provision of alcohol. *Triplex*, 900 S.W.2d at 719 (evidence of radio station's "general participation" in the Ladies Night event was legally insufficient to support submission of a question regarding joint enterprise). The evidence showed, at best, that the radio station could make suggestions that the nightclub's owner could adopt or reject. *Id.* In contrast, in *Able*, the court held there was an equal right of control between TXDOT and Metro with respect to a mass transit project on a state highway where each

party had a contractual right of control pursuant to a Master Agreement and exercised such control over the day-to-day maintenance and operations. *Able*, 35 S.W.3d at 615.

The evidence relevant to the right-of-control element in the instant case consisted of Sloan's testimony that Gonzalez told her on the initial telephone call that he "did not handle probate matters," but would "work with" Turton if she paid a $2,500 retainer and that Turton occasionally told her that he had spoken with Gonzalez about her case. Turton also testified that he "consulted" with Gonzalez about Sloan's case. *Sloan*, 447 S.W.3d at 103-04. No evidence was developed concerning the frequency, substance, or depth of these conversations. It was undisputed that Sloan never again spoke with Gonzalez on the phone, never received any correspondence from him, and never met him until after she filed this lawsuit. Sloan testified: (1) she met and spoke with only Turton about her case; (2) it was Turton who sent her the employment agreement; (3) Turton signed the notice of appearance filed by the Law Office; (4) Turton handled her case from 2004 until it settled in 2008; (5) Turton corresponded with her on both Law Office letterhead and his own solo practice letterhead throughout those four years; and (6) she contacted only Turton, not Gonzalez, when she had questions about her settlement money. *Id.* It was further undisputed that Sloan never received a bill indicating that Gonzalez had spent any time on her case. Turton testified that the employment agreement that he sent Sloan was a standard form used by Gonzalez and his Law Office. *Id*. at 103. As we previously stated, the agreement recites that it is made between Sloan and the "Law Offices of Oscar C. Gonzalez and Eric R. Turton ('Attorneys')" and cites hourly rates for Gonzalez and Turton. *Id.* at 104. However, the words used by the parties in a contract do not necessarily control the substance of the relationship. *Coastal Plains*, 572 S.W.2d at 288 (the terms used by the parties in referring to their arrangement do not control the nature of the relationship as a joint venture). Further, even though Gonzalez set the amount of the retainer and Sloan's check was made payable to the Law Office, Turton put the $2,500 retainer check into

his own IOLTA trust account, not the joint office account he shared with Gonzalez. *Sloan*, 447 S.W.3d at 103-04. This undisputed fact supports an inference that Sloan's case was not a "joint case" on which Gonzalez and Turton would work together, but rather a "referral case" from Gonzalez to Turton.

Viewing this evidence in the light most favorable to the findings of joint venture and joint enterprise, we conclude it fails to amount to any more than a scintilla of evidence of a mutual or equal right of control between Gonzalez and Turton over the day-to-day handling of Sloan's case. There is therefore no evidence of a mutual or equal right to direct and control the handling of Sloan's case as required to support the findings of joint venture and joint enterprise. *See City of Keller*, 168 S.W.3d at 827.

Finally, in its opinion reversing and remanding, the Supreme Court noted, "[w]e express no opinion on whether Chapter 33's proportionate-responsibility scheme supersedes common law joint-venture and joint-enterprise theories for imposing joint and several liability, and leave it to the court of appeals to address that issue in the first instance." *Sloan*, 479 S.W.3d at 835. Based on our holding that the evidence is insufficient to support the joint venture and joint enterprise findings, we need not reach this issue. We likewise need not reach the issue of whether the joint venture and joint enterprise findings would authorize joint and several liability for the DTPA damages arising from Turton's criminal actions.

CONCLUSION

Based on the foregoing analysis, we hold that the evidence is insufficient to support the jury's joint venture and joint enterprise findings. We therefore reverse the trial court's judgment and render judgment against Gonzalez and the Law Office for (i) $77,500 in actual damages for professional negligence, based on the percentages of their proportionate responsibility as found by the jury, (ii) pre-judgment interest on the actual damages at the rate of 5% per annum, (iii) court

costs through trial of $7,830.76, and (iv) post-judgment interest at the rate of 5% per annum. Finally, we affirm the portion of the trial court's judgment imposing the constructive trust.

Rebeca C. Martinez, Justice