Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00670-CV

Berenice C. **DIAZ**, individually and as next friend of J.P.L.,
Appellant

v.

James E. **MONNIG**,
Appellee

&

No. 04-15-00789-CV

Berenice C. **DIAZ**, individually and as next friend of J.P.L.,
Appellant

v.

John A. **MEAD**,
Appellee

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-CI-13493
Honorable Cathleen M. Stryker, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Marialyn Barnard, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: May 31, 2017

AFFIRMED

Appellant Berenice Diaz, individually and as next friend of her minor child, J.P.L., sued James Monnig and John Mead asserting a variety of claims she alleged arose during Monnig's and Mead's representation of her former husband during a custody suit. Diaz appeals from the trial court's summary judgments in favor of Monnig and Mead, as well as the trial court's exclusion of summary judgment evidence. We affirm.

BACKGROUND

In 2004, Jean Phillipe Lacombe and appellant Berenice Diaz obtained a divorce from a Mexican court. The divorce decree awarded custody of their minor son, J.P.L., to Lacombe. The parties engaged in a series of court cases in Mexico regarding custody and possession of J.P.L., and, according to Diaz, a subsequent order from a Mexican court awarded custody to her. Diaz obtained possession of J.P.L. and moved to San Antonio, Texas with the child in 2007.

In early 2009, Lacombe learned Diaz and J.P.L. were living in San Antonio. Lacombe contacted appellee John Mead in March 2009 regarding representation in Bexar County. Mead then contacted appellee James Monnig to serve as co-counsel. On October 15, 2009, Lacombe, represented by Monnig and Mead, filed a petition for enforcement of a child custody determination under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") and its implementing legislation, the International Child Abduction Remedies Act ("ICARA") ("the Petition") in Bexar County, Texas.

Lacombe alleged he was entitled to custody and possession of J.P.L. and that Diaz had no right to custody or possession of J.P.L. A certified copy of Lacombe and Diaz's Mexican divorce decree was attached to Lacombe's petition, as were other translated Mexican court documents. Lacombe specifically pointed out a September 28, 2009 Mexican court of appeals opinion, which found that Diaz's removal of J.P.L. from Mexico violated a lower court's orders and issued an arrest warrant for Diaz. Lacombe requested that he be awarded immediate custody of J.P.L.

Further, Lacombe relied on a January 18, 2006 Mexican appeals court order, in which the court suspended an order subsequent to the divorce decree that transferred custody to Diaz when Lacombe failed to timely report his new phone number. Lacombe argued the language of the January 18, 2006 order made the divorce decree the controlling custody order.

An *ex parte* emergency hearing was held the same day the petition was filed. Lacombe and Arturo Ochoa, one of Lacombe's Mexican attorneys, were present at the emergency hearing, affording the trial court the opportunity to question counsel regarding the contents of the documents presented with the petition. The trial court granted Lacombe's request for a warrant to take physical custody of J.P.L. and ordered Lacombe, with J.P.L., and Diaz to appear on Monday, October 19, 2009, for a hearing on Lacombe's petition. The warrant was executed, and Lacombe obtained possession of J.P.L. on October 16, 2009.

The morning of October 19, 2009, at Lacombe's direction via voicemail message, Monnig announced to the presiding judge he was nonsuiting the case on Lacombe's behalf. Neither Diaz nor her counsel objected, and the presiding judge signed an order nonsuiting Lacombe's action. Lacombe did not appear with J.P.L., and it was later discovered Lacombe left the country with J.P.L.

On October 28, 2009, Diaz filed a Motion for Sanctions pursuant to Section 10 of the Texas Civil Practices and Remedies Code, which was denied by the trial court following a hearing. Diaz then filed a Motion to Set Aside Nonsuit, which was denied by the trial court on November 17, 2009.

In October 2011, Diaz added Monnig and Mead as defendants in her Fourth Amended Petition for Enforcement of Child Custody Determination Pursuant to the Hague Convention and ICARA, alleging interference with possessory right of child, abuse of process, negligent/fraudulent misrepresentation, and civil conspiracy. In subsequent amended petitions, Diaz added additional

causes of action against Monnig and Mead, including negligent misrepresentation per se, negligence, false imprisonment, fraud by nondisclosure, constructive fraud, negligent misrepresentation by omission, and assisting and encouraging.

Monnig and Mead filed hybrid no-evidence and traditional motions for summary judgment, which were granted by the trial court. Monnig's and Mead's motions for severance were also granted. Thereafter, Diaz perfected these appeals.

EXCLUSION OF SUMMARY JUDGMENT EVIDENCE

Diaz contends the trial court erred by excluding Exhibits 10 and 11, which were attached to her responses to Monnig's and Mead's motions for summary judgment. Exhibit 10 is testimony given by the Bexar County District Attorney ("ADA") who presented the case against Lacombe to the grand jury. The testimony refers to the criminal investigation into, indictment of, and criminal case against Lacombe. Exhibit 11 is a copy of a grand jury indictment alleging Lacombe committed multiple offenses, including kidnapping, interference with child custody, and making false statements. Monnig and Mead objected to Exhibits 10 and 11, arguing the contents of the exhibits were inadmissible hearsay. The trial court agreed, and excluded the exhibits from the summary judgment evidence. Diaz argues the trial court's exclusion of the indictment and ADA's testimony prevented her from adequately presenting evidence of Lacombe's criminal conduct.

Standard of Review

We review a trial court's ruling on evidentiary issues for abuse of discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). A trial court abuses its discretion when it acts without regard for guiding rules or principles. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). Even if the trial court errs by admitting or excluding evidence, reversal is only appropriate if the error is harmful, that is, the error probably resulted in an improper judgment. *Id*. We ordinarily will not reverse a judgment because the trial court erroneously

excluded evidence when the evidence in question is cumulative or not controlling on a material issue dispositive to the case. *Id*. In determining whether the excluded evidence probably resulted in the rendition of an improper judgment, we review the entire record. *See McShane*, 239 S.W.3d at 234.

Discussion

Evidence presented in support of a summary judgment motion or response must be in the same admissible form as would be required in a conventional trial. TEX. R. CIV. P. 166a(f). Hearsay is defined as an out-of-court statement offered for the truth of the matter asserted. TEX. R. EVID. 801(d) and 802. Hearsay testimony is inadmissible except as provided by statute or the rules of evidence. TEX. R. EVID. 802. In this case, Diaz's stated purpose in offering the ADA's testimony and the indictment was to prove Lacombe engaged in criminal conduct in relation to statements made to the trial court in the October 15 petition and hearing, as well as by nonsuiting the case at the October 19 hearing and failing to appear for that hearing. Offered for that purpose, the evidence constitutes hearsay.

ADA's Testimony – Exhibit 10

Rule 804(b)(1) allows the admission of hearsay in the form of an unavailable witnesses' testimony that was given at a trial or hearing of the current proceeding and is offered against a party who had an opportunity to develop the testimony by direct, cross-, or redirect examination. TEX. R. EVID. 804(b)(1). Assuming, without deciding, the ADA was unavailable as described in Rule 804(a), the hearsay exception requires the testimony be offered against a party or similarly situated person who had opportunity to develop the testimony. TEX. R. EVID. 804(b)(1). At the time the ADA testified, neither Monnig nor Mead were parties to the underlying action. The record does not indicate any person with interests similar to Monnig or Mead had an opportunity to develop the ADA's testimony. Accordingly, the ADA's testimony does not meet the exceptions

to the hearsay rule, and based upon our review of the record, we conclude the trial court's exclusion of Exhibit 10 was not an abuse of discretion.

Indictment – Exhibit 11

Evidence of a final judgment of a felony conviction may be admitted over a hearsay objection, if the judgment was entered after a trial or guilty plea; the evidence is admitted to prove a fact essential to the judgment; and an appeal of the conviction is not pending. TEX. R. EVID. 803(22)(A). However, in this case, the document Diaz sought to admit is not a final judgment of conviction, but an indictment. An indictment is a written statement of a grand jury accusing a person of an offense or offenses. TEX. CODE CRIM. PROC. ANN. art. 21.01. As such, the indictment does not satisfy the requirements of an exception to the hearsay rule. We conclude the trial court's exclusion of Exhibit 11 was not an abuse of discretion.

Accordingly, we overrule Diaz's issue complaining of the trial court's exclusion of summary judgment evidence.

SUMMARY JUDGMENT

Standard and Scope of Review

We review a summary judgment *de novo*. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We take as true all evidence favorable to the nonmovant and we indulge all reasonable inferences and resolve any doubts in the nonmovant's favor. *Id*. When, as here, a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, we will affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Id*. at 216.

In a traditional motion for summary judgment filed under Texas Rule of Civil Procedure 166a(c), the movant must establish that there is no genuine issue of material fact and he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Co.*

Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999). The movant has the burden to conclusively negate at least one of the essential elements of the challenged cause of action or to conclusively prove all of the elements of an affirmative defense. *Little v. Tex. Dep't of Crim. Justice*, 148 S.W.3d 374, 381 (Tex. 2004); *Pustejovsky v. Rapid–American Corp.*, 35 S.W.3d 643, 646 (Tex. 2000). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 814 (Tex. 2005).

In a no-evidence motion for summary judgment filed under Texas Rule of Civil Procedure 166a(i), the movant challenges the evidentiary support for a specific element of a claim or defense after an adequate time for discovery. TEX. R. CIV. P. 166a(i) cmt. The burden shifts to the nonmovant to produce summary judgment evidence that raises a genuine issue of material fact on the challenged element. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). The nonmovant is not required to marshal its proof, but must point out evidence that raises a fact issue on each of the challenged elements. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002). Both direct and circumstantial evidence may be used to establish a material fact. *Ford Motor Co.*, 135 S.W.3d at 601. "A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Id.* at 600. "[M]ore than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Id.* at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

Discussion

In their joint traditional and no-evidence motions for summary judgment, Monnig and Mead argued they were entitled to summary judgment on Diaz's claims on the basis of attorney immunity because Diaz's claims were based on conduct that occurred during their representation

of Lacombe. Monnig and Mead further argued they were entitled to summary judgment on the basis of res judicata and statute of limitations and because there is no evidence to support Diaz's allegations. On appeal, Diaz argues Monnig and Mead are not entitled to summary judgment because genuine issues of material fact remain and they failed to prove their affirmative defenses. Diaz also argues res judicata and the statute of limitations do not apply.

Generally, when a party moves for summary judgment on no-evidence and traditional bases, we analyze the no-evidence motion first. *Ford Motor Co.*, 135 S.W.3d at 600. But in this case, we will forgo the no-evidence motion analysis because we "must affirm summary judgment if any of the summary judgment grounds are meritorious." *See Provident Life & Acc. Ins. Co.*, 128 at 215.

Attorney Immunity

Applicable Law

Attorney immunity is an affirmative defense. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). Generally, attorneys are immune from civil liability to non-clients for actions taken if the attorneys conclusively establish that their alleged conduct was within the scope of their legal representation of a client. *Id*. Thus, to be entitled to summary judgment on the basis of attorney immunity, Monnig and Mead were required to establish no genuine issue of material fact existed as to whether their conduct was protected by the attorney-immunity doctrine and they were entitled to judgment as a matter of law. *Id.*; *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). That is, Monnig and Mead were required to conclusively establish their alleged conduct was within the scope of their legal representation of Lacombe, which they did.

The purpose of the attorney immunity defense is to ensure loyal, faithful, and aggressive advocacy. *Cantey Hanger*, 467 S.W.3d at 481. Attorneys are allowed latitude to pursue legal

rights they deem necessary and proper to avoid the inevitable conflict that would arise if they were constantly forced to balance their own potential exposure to suit against their client's best interest. *Id*. at 483.

In *Cantey Hanger*, the Texas Supreme Court explained that even wrongful or fraudulent conduct may fall within the scope of client representation. *Cantey Hanger*, 467 S.W.3d at 483-85 (rejecting the statement in *Toles v. Toles*, 113 S.W.3d 899, 911 (Tex. App.—Dallas 2003, no pet.), that attorney immunity does not extend to attorney's knowing participation in fraudulent activities on client's behalf). The supreme court directs that "the focus in evaluating attorney liability to a non-client is 'on the kind—not the nature—of the attorney's conduct.'" *Id*. at 483 (quoting *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmeyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *8 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op. on reh'g)). The court made clear that "[m]erely labeling an attorney's conduct 'fraudulent' does not and should not remove it from the scope of client representation or render it 'foreign to the duties of an attorney.'" *Id*. at 484 (citing *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (holding that a claim against an attorney for conspiracy to defraud was not actionable where "the complained-of actions involve filing of lawsuits and pleadings, the providing of legal advice upon which the client acted, and awareness of settlement negotiations—in sum, acts taken and communications made to facilitate the rendition of legal services to [the client]")).

However, attorneys are not protected from liability to non-clients for actions that do not qualify as "the kind of conduct in which an attorney engages when discharging his duties to his client." *Id*. (quoting *Dixon Fin. Servs. Ltd. v. Greenberg, Peden, Siegmeyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548 at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op. on reh'g)). For example, an attorney who partners in a fraudulent business

scheme with his client or assaults opposing counsel during a hearing is not protected by the doctrine because such acts are "entirely foreign to the duties of an attorney" and "not part of the discharge of an attorney's duties in representing a party." *Id*. (citing *Poole v. Houston & T.C. Ry. Co.*, 58 Tex. 134 (1882), and *Bradt v. West*, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

Therefore, we focus on "the kind—not the nature" of Monnig's and Mead's conduct to determine if Monnig and Mead met their burden of proving their acts were within the scope of their representation of Lacombe. *Id*. at 483.

Diaz's Argument and Allegations

Diaz brought eleven causes of action against Monnig and Mead. Diaz does not dispute the alleged misconduct undertaken by Monnig and Mead was done in connection with their representation of Lacombe. Rather, Diaz alleges Monnig and Mead engaged in conduct "foreign to the duties of an attorney" by, together with Lacombe, developing and executing a plan to obtain custody and possession of J.P.L. through misrepresentation and fraudulent means. Diaz argues such conduct is not within an attorney's "scope of legal representation" and not protected by attorney immunity. Diaz's allegations against Monnig and Mead involved the same alleged misconduct, as described below.

Diaz alleged that Monnig and Mead attached only some of the documentation she considers relevant to the custody and possession of J.P.L. to the Petition. Diaz further alleged Monnig and Mead misrepresented the contents of the January 18, 2006 Mexican appeals court order. Additionally, Diaz alleged misconduct on Monnig's and Mead's parts regarding their arguments in favor of the Petition during an *ex parte* hearing. Diaz also complained Monnig and Mead engaged in misconduct in their drafting of the orders granting the relief sought in the Petition. Diaz additionally alleged it was misconduct for Monnig and Mead to time the execution of the

warrant so that it occurred on a Friday afternoon when there was no time for her to respond. Diaz further characterized Monnig and Mead appearing before the presiding judge on October 19, 2009 and announcing a nonsuit without additionally informing the presiding judge that Lacombe had been ordered to appear and was disobeying a court order by not doing so, as misconduct and part of a conspiracy to illegally obtain possession of J.P.L., as well as assisting Lacombe in interfering with her possessory rights to J.P.L.

Diaz relies on the testimony of her expert, James McCormack, former chief disciplinary counsel for the State Bar of Texas, as support that Monnig and Mead are not entitled to the attorney immunity defense. McCormack testified that generally violations of the Texas Disciplinary Rules are prohibited by law and falsely representing a pleading is a violation of the disciplinary rules. According to McCormack, Monnig and Mead had a duty to inform the presiding judge Lacombe had been ordered to appear on October 19, 2009, but was disobeying that order. Further, McCormack testified that an attorney assisting his client in avoiding a mandatory provision of the Family Code violates the disciplinary rules. Finally, McCormack opined that by misrepresenting Lacombe's intent on October 19, 2009, Monnig and Mead engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation in violation of the Rules of Disciplinary Conduct.

Monnig's and Mead's Argument and Evidence

In their affidavits and deposition testimony, Monnig and Mead state they zealously advocated for their client, and they describe their representation of Lacombe and the actions they took on behalf of their client. Both Monnig and Mead reviewed the documents provided by Lacombe. Because neither read or understood Spanish, Lacombe hired a translator to translate the documents into English. Prior to the hearing on October 15, 2009, Lacombe and two of his Mexican attorneys met with Monnig and Mead to review the translated documents. One of the

attorneys, Ochoa, also attended the October 15, 2009 *ex parte* hearing with Lacombe to answer any questions regarding J.P.L.'s custody status of the Mexican court proceedings and orders.

Ochoa testified via affidavit as to the Mexican court proceedings and court rulings regarding J.P.L.'s custody. According to Ochoa, Lacombe was awarded custody of J.P.L. in the final divorce decree in 2004, but in June 2005, custody was awarded to Diaz after Lacombe failed to meet a condition of the final divorce decree. Lacombe appealed the change of custody, and on January 18, 2006, the Mexican appellate court ruled on the appeal, suspending the surrender of J.P.L. to Diaz. According to Ochoa, there were no later orders changing custody to Diaz.

Ochoa stated he reviewed the petition with Monnig and Mead, and he confirmed its contents were correct with regard to J.P.L.'s custody status in Mexico at that time, as well as with regard to the effective custody order in Mexico. According to Monnig, it was his understanding, after the review of the documents, that: "[Lacombe] had custody of the child under orders out of the Mexican courts, and his — his former wife had obtained possession and disappeared." Mead also stated it was his understanding the Mexican courts awarded physical custody of J.P.L. to Lacombe.

On October 17, 2009, Mead received a phone call from Lacombe regarding a confrontation between Lacombe and Diaz. Mead testified that during the conversation, he reiterated to Lacombe that both Lacombe and J.P.L. were required to appear at the October 19 hearing. According to Mead, Lacombe assured Mead that he and his son would appear at the hearing. However, on the morning of the hearing, Mead received a voice mail from Lacombe that had been left sometime the night before. In the voice mail, Lacombe stated he would not appear at the hearing and directed the case should be dropped. Mead relayed the message to Monnig when he arrived at the office. Monnig announced the nonsuit when the presiding judge called the case later.

According to Monnig, he had no further in-person contact with Lacombe after the October 15, 2009 hearing. After the nonsuit order was signed on October 19, 2009, "sometime in the next two or three weeks," Monnig and Mead learned Lacombe had left San Antonio with J.P.L. Monnig communicated with Lacombe via email, informing Lacombe that he needed to return J.P.L. to San Antonio. Monnig and Mead also terminated the attorney-client relationship, and Monnig sent an email to Lacombe's last known email address to confirm the termination.

Discussion

Despite Diaz's characterizations of Monnig and Mead's actions, the actions themselves—acquiring translations of foreign-language documents from the client that are material to the litigation, reviewing the documents with foreign counsel, relying on both the document translations and foreign counsels' explanations of the documents, attaching the documents to the petition, taking part in an emergency *ex parte* hearing, making arguments in favor of the client during a hearing, drafting orders for the court that are favorable to the client, timing the execution of a warrant to be most advantageous for the client, following the client's direction to nonsuit a case—are the kinds of actions that are part of the discharge of attorneys' duties in representing their client in contentious litigation.

However, this is not to say that attorneys are not otherwise answerable for any misconduct. *See Cantey Hanger*, 467 S.W.3d at 484. Attorney immunity does not grant attorneys the right to violate ethical rules; rather it limits third-party recovery against attorneys acting within the scope of their representation. *Id.* Other mechanisms, such as sanctions, contempt, and attorney disciplinary proceedings, are in place to discourage and remedy wrongful conduct. *Id.*; *see also Renfor v. Jones & Assocs.*, 947 S.W.2d 285, 287 (Tex. App.—Fort Worth 1997, writ denied) ("If an attorney's conduct violates his professional responsibility, the remedy is public, not private.").

However, the issue before us is not the nature of Monnig's and Mead's conduct but whether their actions fall within the scope of their representation of Lacombe. We conclude that the actions taken by Monnig and Mead, and that are the subject of this litigation, are the kinds of actions that are part of the discharge of an attorney's duties in representing a party. *See Cantey Hanger*, 467 S.W.3d at 485; *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.). Because Monnig and Mead conclusively established their conduct was within the scope of their legal representation of their client, summary judgment was proper.

Accordingly, we overrule Diaz's issue arguing Monnig and Mead were not entitled to attorney immunity. Because at least one ground advanced by the summary judgment motion is meritorious, we need not address Diaz's arguments challenging other grounds argued by Monnig and Mead on summary judgment.

CONCLUSION

We affirm the trial court's judgment.

Irene Rios, Justice