COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00378-CV

SANDRA E. PARKER — APPELLANT

V.

ROBERT J. GLASGOW, JR.; AND GLASGOW, TAYLOR, ISHAM & GLASGOW, P.C. — APPELLEES

FROM THE 355TH DISTRICT COURT OF HOOD COUNTY
TRIAL COURT NO. C2014011

MEMORANDUM OPINION[1]

Is a former client barred as a matter of law from bringing a legal malpractice claim against the attorney and law firm who assisted her in obtaining a mediated property settlement and agreed judgment in a divorce based on the attorney's allegedly negligent pre-settlement advice? We hold that the answer is

[1]*See* Tex. R. App. P. 47.4.

no in this appeal from a take-nothing summary judgment on Sandra E. Parker's legal malpractice claims against her former counsel Robert J. Glasgow, Jr. (Glasgow) and his law firm Glasgow, Taylor, Isham & Glasgow, P.C. (the Law Firm). Because we hold that neither principles of quasi-estoppel nor public policy bar Sandra's legal malpractice claim as a matter of law, we sustain her first two issues challenging the summary judgment on those grounds. But because her breach of contract claim, on which the trial court also granted summary judgment, is barred by the anti-fracturing rule, we affirm the summary judgment on that claim.

Glasgow and Law Firm Assist Sandra in Obtaining a Mediated Settlement Agreement in Her Divorce

Sandra engaged Glasgow and the Law Firm to represent her in filing a divorce petition in Hood County. A primary concern in the determination of a just and right property division was the valuation of numerous parcels of commercial real property that her then-husband Paul had acquired during the marriage. Sandra and Glasgow had talked about hiring an expert to appraise the value of those properties. But Sandra claims that Glasgow told her that hiring a forensic accounting expert to do that was too expensive and that she just needed to use the information she already had—which she contends is the tax appraisal values of those properties—in determining a proposed property division. Sandra knew that if she had the money she could hire an expert, but according to Sandra, Glasgow "kept telling [her] it was too expensive."

Sandra testified in a deposition in this suit that she had to borrow money from her mother to file the divorce petition and pay Glasgow and that she never hired a forensic accountant to help her value the properties because she did not have the available up-front money to do so. Sandra did not think she had any way to access the money Paul was controlling to pay for such an expert.

Sandra and Paul attended meditation in an attempt to agree on a property division. Sandra knew that settling the property issues at mediation would effect the divorce more quickly and less expensively than going to trial, and she was told that the offer she received from Paul at mediation "was the best [she] could do at mediation." Knowing she could have hired an expert before agreeing to anything at mediation (but still believing that she did not have the up-front money to do so), Sandra admitted she voluntarily and of her own free will agreed to a binding property division at mediation. *See* Tex. Fam. Code Ann. § 6.602(b) (West 2006). In making the settlement, Sandra and Paul used the tax appraisal values of the properties other than their residence. But they placed the residence value at $100,000 higher than market value because Sandra had asked a real estate agent about the market value of that property. *See* Tex. Tax Code Ann. § 23.23 (West 2015) (limiting taxing authority's assessment of *residential* property to no more than ten percent over prior assessment's value even if actual market value higher). Although Sandra admitted she voluntarily settled the property division of her own free will and that she wanted to settle it at mediation even knowing she had questions about the property valuations, she

also said she chose to go forward because Glasgow and the mediator told her that it was her "only choice." She does not contend that she was forced to settle.

At a prove-up of the mediated settlement before the trial court, Sandra testified that she believed the settlement was just and right. As part of the settlement, Sandra received a judgment for $600,000 against Paul, secured by a note and deed of trust on commercial property in Granbury. The trial court rendered an agreed judgment based on the mediated settlement agreement.

According to Sandra, after the divorce, she found out that the market value of the commercial properties was much higher than the tax appraisal value when she found out how much Paul had received in a sale of one of those properties. She then filed this suit against Glasgow and the Law Firm bringing both a legal malpractice claim and a breach of contract claim.

Glasgow and the Law Firm filed two partial motions for summary judgment: one for the legal malpractice claim and a separate motion for the breach of contract claim. The trial court granted both motions and a final, take-nothing judgment. Sandra challenges the trial court's rulings on both motions on appeal.

Standard of Review

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp*

Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011); *see* Tex. R. Civ. P. 166a(b), (c).

A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *Frost Nat'l Bank*, 315 S.W.3d at 508–09; *see* Tex. R. Civ. P. 166a(b), (c). To accomplish this, the defendant-movant must present summary judgment evidence that conclusively establishes each element of the affirmative defense. *See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

Factual Allegations in Sandra's Petition

In her first amended petition, the live pleading, Sandra alleged (1) that after filing her divorce petition, appellees "failed to diligently prosecute her case," conducting no written discovery and failing to obtain a sworn inventory and appraisement from Paul, (2) that appellees "misinformed [her] that rental income generated by Paul's separate properties during the marriage constituted Paul's separate property," (3) that she had "very little reliable information upon which to make her settlement decision" at mediation and—"[o]n the advice of her attorneys," and in reliance on their "representation that the court would divide the

parties' real property based on its tax appraisal value, as opposed to fair market value, and that the tax appraisal value was the proper method of valuing the parties' real property for the purposes of settlement"—she accepted the settlement agreement, (4) that appellees "advised [her] that she had no right to investigate bank accounts in the name of others, even though she had evidence that her husband had deposited funds in others' accounts," and (5) that appellees "did not properly document the purchase money lien in the deeds from [her] to Paul, which generated additional litigation and expense for" her. Sandra also alleged that

> [w]hen Paul subsequently sold one of the properties that he was awarded under the divorce decree, [she] discovered that the real properties awarded to Paul were worth *significantly* more than the tax appraisal value. [She] learned that the appropriate method for valuing property in a divorce proceeding is fair market value, as opposed to tax appraisal value. [She] was disheartened to discover that she had allowed Paul to keep all of the parties' real property, and had received credit only for the tax appraisal value of that property, at most. Absent [appellees'] bad advice in this respect, [she] would have received substantially more in her divorce.

Sandra further alleged that appellees breached a contract with her by failing to "properly investigate the underlying facts," failing to "properly prosecute and manage the litigation," and giving her erroneous legal advice and opinions.

Summary Judgment Grounds

In their motion for summary judgment on Sandra's legal malpractice claim, appellees alleged broadly that Sandra "seeks to re-trade a voluntary settlement and further attempts to go behind an Agreed Final Decree of Divorce which she

previously utilized to obtain substantial benefit." Appellees raised two specific grounds for summary judgment on Sandra's legal malpractice claim: (1) that it is barred by principles of quasi-estoppel because, Sandra's having voluntarily settled her property-division *with Paul* and accepted a benefit from the settlement—and in the course of doing so representing that the property division is just and right—it would be unconscionable to allow Sandra to assert in this suit *against appellees* that the property division is not just and right, and (2) Sandra's suit is barred by public policy favoring the enforcement of voluntary settlement agreements. Appellees therefore raised two legal questions as their summary-judgment grounds; they did not move on no-evidence grounds, nor did they allege that they had conclusively proved that Sandra's factual allegations are false. Therefore, in accordance with the applicable standard of review, we will not consider any contentions in their brief that Sandra's allegations of negligence are unmeritorious.

In their motion for summary judgment on Sandra's breach of contract claim, appellees urged that it is precluded by the anti-fracturing rule, which "prevents plaintiffs from converting what are actually professional negligence claims against an attorney into other claims such as fraud, breach of contract, breach of fiduciary duty, or violations of the DTPA." *Won Pak v. Harris*, 313 S.W.3d 454, 457 (Tex. App.—Dallas 2010, pet. denied).

Legal Malpractice Claim Not Barred by Quasi-Estoppel

Sandra challenges the summary judgment on her legal malpractice claim in her first issue. We agree that summary judgment was not proper on quasi-estoppel grounds.

Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. *See id.* Quasi-estoppel requires mutuality of parties and may not be asserted by or against a "stranger" to the transaction that gave rise to the estoppel. *See Swilley v. McCain*, 374 S.W.2d 871, 875–76 (Tex. 1964); *Am. Sur. Co. of N.Y. v. Martinez*, 73 S.W.2d 109, 113 (Tex. Civ. App.—El Paso 1934, writ ref'd); *Thomas v. C & M Jones Invs.*, *LP*, No. 03-14-00374-CV, 2016 WL 3924429, at *4 n.14 (Tex. App.—Austin July 15, 2016, no pet.) (mem. op.); *Deutsche Bank Nat'l Trust Co. v. Stockdick Land Co.*, 367 S.W.3d 308, 315 n.13 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (op. on reh'g). Moreover, estoppel is designed to protect the innocent; thus, a party may not urge estoppel as a shield against its own tortious acts. *Stimpson v. Plano ISD*, 743 S.W.2d 944, 946 (Tex. App.—Dallas 1987, writ denied); *Brodrick Moving & Storage Co. v. Moorer*, 685 S.W.2d 75, 77 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.).

Although an attorney who holds a contingent interest in the subject matter of litigation and who appears at and conducts a trial of that litigation is bound by a judgment entered against his client, *Miller v. Dyess*, 151 S.W.2d 186, 190 (Tex.), *cert. denied*, 314 U.S. 691 (1941); *Dickson v. BNSF Ry. Co.*, No. 05-14-01575-CV, 2015 WL 6777876, at *6 (Tex. App.—Dallas Nov. 6, 2015, pet. denied) (mem. op.), an attorney is not in privity with a third party settling with his client merely by virtue of that representation, *see Rogers v. Walker*, No. 13-12-00048-CV, 2013 WL 2298449, at *3 (Tex. App.—Corpus Christi May 23, 2013, pet. denied) (mem. op.); *Continental Sav. Ass'n v. Collins*, 814 S.W.2d 829, 832 (Tex. App.—Houston [14th Dist.] 1991, no writ) ("It would be a surprise to this court and to the lawyers of the state of Texas to learn that by virtue of mere representation a lawyer establishes privity with his client."). Additionally, the act of settling would not necessarily bring the attorney into privity because the mere fact of settlement does not establish fault. *See Henson v. S. Farm Bureau Cas. Ins.*, 17 S.W.3d 652, 654 (Tex. 2000); *Allstate Indem. Co. v. Hadley Med. Clinic*, No. 14-06-00436-CV, 2007 WL 4335500, at *6 (Tex. App.—Houston [14th Dist.] Dec. 13, 2007, no pet.) (mem. op.) ("Settling a case generally does just that: it resolves the issues between the parties without admission of culpability, fault, or liability.").

Here, Sandra did not litigate or settle in her divorce any claims against appellees for their pre-settlement legal advice or representation. Thus, her subsequent legal malpractice suit based on appellees' alleged breaches of the

standard of care in representing her during the divorce does not have mutuality of parties or issues with the divorce, precluding the application of quasi-estoppel to her claims. *Cf. Lopez*, 22 S.W.3d at 863–64 (holding that claim seeking reimbursement of part of law firm's contingency fee not barred by quasi-estoppel because, in settling of underlying litigation, clients did not knowingly relinquish claims that law firm overcharged its fee included in settlement); *Byrd v. Woodruff*, 891 S.W.2d 689, 699 (Tex. App.—Dallas 1994, writ dism'd by agr.) (holding that estoppel and collateral estoppel did not bar subsequent legal malpractice claim after settlement of personal injury suits because no party litigated a legal malpractice claim in those suits); *cf. Kramer v. Kastleman*, 508 S.W.3d 211, 220, 226–28, 230, 232 (Tex. 2017) (discussing unique nature of property-division determinations in divorce cases in context of clarifying acceptance-of-the-benefits doctrine and noting, "Because judgments in marital-dissolution cases typically divide assets in which a party's right to possession and control precedes the final decree, invoking estoppel based on dominion over that property while the litigation is ongoing presents a more complex scenario than other civil disputes").

Appellees equate Sandra's claim against them to an attempt to invalidate the terms of the settlement from which she has already accepted benefits. *Cf. Kramer*, 508 S.W.3d at 226–28, 230, 232 (explaining that the acceptance-of-benefits doctrine is a form of estoppel that in some cases can bar *an appeal* of a judgment based on a settlement if the particular facts show that the appellee has

been unfairly prejudiced and the appellant's "clear intent to acquiesce in the judgment's validity," which in a divorce case does not simply mean that the appellant has exercised dominion over the marital property awarded to him or her in the judgment being appealed). But if estoppel could apply in this case, it would apply to bar any subsequent attempt by Sandra to obtain a higher money judgment from Paul, not to her pre-settlement negligence claims against appellees, with whom she settled nothing in the divorce. Appellees contend Sandra knowingly made the decision to forego hiring an expert and thus should not be able to contend that the settlement amount was inadequate. But Sandra contends that her decision to do so was influenced by appellees' faulty advice that there was no way she could engage an expert without prepaying money she did not have in hand and that even if she did, the amount she had to pay for the expert would not result in a return on the property division equal to or more than what she ended up having to pay for the expert. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.03(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *see also Meyer v. Wagner*, 709 N.E.2d 784, 791 (Mass. 1999) (holding that judicial estoppel did not bar legal malpractice claim in which the plaintiff was "attempting to show that her position in the divorce action was the result of the defendant's malpractice" because to apply estoppel in such an instance "would create the anomaly of permitting possible wrongdoing by an

attorney, of which the plaintiff had no knowledge, to constitute the basis for barring a later claim by the plaintiff that may have merit"); *Crowley v. Harvey & Battey, P.A*., 488 S.E.2d 334, 334–35 (S.C. 1997) (op. on reh'g) (reversing summary judgment on legal malpractice claim that trial court had found was barred because the appellant had ratified the negligence by accepting financial benefits under a settlement and by attempting to enforce the settlement, holding that "where, as here, the settlement itself cannot be attacked and the issue is not one of agency but of negligence, the fact the client has accepted the benefits of the settlement and judicially sought to enforce its terms are not bars to maintenance of a malpractice claim").

Whether Sandra's settlement agreement was procured as a result of Glasgow's negligent advice or lack of discovery is not an issue that was litigated or settled in the divorce. *Cf. Lopez*, 22 S.W.3d at 863–64; *Vanasek v. Underkofler*, 50 S.W.3d 1, 15 (Tex. App.—Dallas 1999), *rev'd in part on other grounds*, 53 S.W.3d 343, 347 (Tex. 2001) (affirming intermediate court's holding that summary judgment was not proper on legal malpractice claim but reversing that court's holding on DTPA claim); *Helmbrecht v. St. Paul Ins.*, 362 N.W.2d 118, 131 (Wis. 1985) ("Colwin was not obligated to negotiate a settlement for his client, but, in doing so, he had a duty to negotiate with reasonable diligence. This is difficult, if not impossible, when all of the relevant and pertinent facts are not known when an attorney enters into negotiations."). Therefore, the doctrine

of quasi-estoppel does not apply as a matter of law to bar Sandra's legal malpractice claims in this case. We sustain Sandra's first issue.

Legal Malpractice Claim Not Against Public Policy Encouraging Settlement

In her second issue, Sandra contends the trial court erred by granting summary judgment on her legal malpractice claim because it should not be barred by our state's general public policy favoring settlements. We agree.

Texas has a strong public policy in favor of settlement of disputes. *See* Tex. Civ. Prac. & Rem. Code Ann. § 154.002 (West 2011); *Wright v. Sydow*, 173 S.W.3d 534, 552 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). Appellees contend that allowing Sandra to bring a legal malpractice claim after settling her divorce would violate this public policy by discouraging attorneys from pursuing settlements for their clients. In their motion for summary judgment, appellees relied on *Scoggin v. Henderson*, which held that—to encourage settlement of disputes—"a malpractice suit filed by a dissatisfied plaintiff against his attorney following a settlement to which he freely agreed should not be allowed unless there was fraudulent inducement to settle." No. 05-92-01103-CV, 1993 WL 15496, at *6 (Tex. App.—Dallas Jan. 26, 1993, no pet.) (not designated for publication).

Henderson had represented Scoggin in an employment lawsuit but during that suit accepted employment with Scoggin's law firm and was disqualified by the trial court. Scoggin then settled his employment suit and sued Henderson, claiming that Henderson's disqualification "forced [him] to accept a grossly

inadequate settlement." *Id.* at *5. The Dallas court of appeals examined cases cited by Scoggin in favor of maintaining the malpractice suit and noted that his reliance on them was misplaced because in those cases, "the lawyer involved committed negligent acts in obtaining the settlement." *Id.* at *6. The court of appeals also noted that "there is no evidence that Henderson committed negligent acts in obtaining the settlement." *Id.*

The *Scoggin* court based its holding on the holding of the Pennsylvania supreme court in *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa.), *cert. denied*, 502 U.S. 867 (1991). In *Muhammad*, the court, over a strongly worded dissent joined by a second justice, established a blanket rule foreclosing a legal malpractice suit against an attorney who represented a client in a suit that settled, in the absence of any evidence of fraudulent inducement:

> [W]e foreclose the ability of dissatisfied litigants to agree to a settlement and then file suit against their attorneys in the hope that they will recover additional monies. To permit otherwise results in unfairness to the attorneys who relied on their client's assent and unfairness to the litigants whose cases have not yet been tried. Additionally, it places an unnecessarily arduous burden on an overly taxed court system.
>
> We do believe, however, there must be redress for the plaintiff who has been *fraudulently induced* into agreeing to settle. It is not enough that the lawyer who negotiated the original settlement may have been negligent; rather, the party seeking to pursue a case against his lawyer after a settlement must plead, with specificity, fraud in the inducement.

Id. at 1351–53.

We are reluctant to rely on either *Scoggin* or *Muhammad* because not only is *Scoggin* distinguishable, the holding in *Muhammad*, upon which it relied, has been limited by the Pennsylvania courts and rejected by every other state court considering it.

In *McMahon v. Shea*, the Pennsylvania Supreme Court affirmed the judgment of the Pennsylvania Superior Court holding that *Muhammad* applied to bar only a legal malpractice suit following settlement in which the attorney's alleged negligence lay only in his or her judgment about what an appropriate settlement amount would be, not to allegations that the attorney failed to properly advise the client about the applicable law and the impact of settlement. 688 A.2d 1179, 1181–82 (Pa. 1997), *aff'g*, 657 A.2d 938 (Pa. Super. Ct. 1995). Although *McMahon* was a 3-3 decision, the three concurring justices only disputed a statement in the majority opinion that *Muhammad* was limited solely to its facts; the concurring justices did, however, agree that *Muhammad* does not apply to allegations of attorney negligence in a settled case that go beyond a contention that the attorney was negligent in advising regarding a settlement amount. *Id.* at 1183 (Cappy, J., concurring).

In a subsequent Pennsylvania Superior Court decision, a panel applied the same reasoning as *McMahon*, holding that *Muhammad* did not apply to bar a legal malpractice suit "seeking to hold [the lawyer] accountable for allegedly flawed legal advice" because to do so would not advance the interest of finality in settlements. *Kilmer v. Sposito*, 2016 PA Super 141, ¶ 12, 146 A.3d 1275, 1280.

In that case, the attorney had advised his client, a surviving spouse, to file an election to take against her late husband's will, which entitled her to only one-third of the estate, when had she not filed the election she would have been entitled to one-half of the estate. *Id.* ¶ 2, 146 A.3d at 1277. The client fired the lawyer, and her new lawyer negotiated a settlement of 41.5% of her late husband's estate. *Id.* ¶ 3, 146 A.3d at 1277. The court described the limitation of *Muhammad*'s holding thusly:

> *Muhammad*, therefore, stands for the proposition that dissatisfied plaintiffs may not later challenge an attorney's professional judgment *with respect to an amount of money to be accepted in a settlement*, unless plaintiffs plead and can prove they were fraudulently induced to settle. As such, the *Muhammad* decision is inapposite to the present action, which focuses not on Appellee's professional judgment in negotiating a settlement—indeed, he was no longer Appellant's attorney when Appellant challenged the Final Accounting and ultimately settled—but on his failure to advise her correctly on the law pertaining to her interest in her late husband's estate. The facts of this case *sub judice*, therefore, take it outside the scope of the *Muhammad* prohibition against second-guessing an attorney's judgment as to settlement amounts.

Id. ¶ 9, 146 A.3d at 1279–80 (additional emphasis added).

Here, Sandra has not alleged merely that appellees were negligent in making a judgment call about the value placed on the real property or the marital estate in general or in recommending settlement. Instead, Sandra alleges that she was negligently advised that there was no need to seek an expert to value the properties and not told that she could seek a court order awarding her money from Paul to do so. Thus, even the principles underlying the reasoning of the

Muhammad decision would not bar Sandra's suit as a matter of public policy. *Cf. Elizondo v. Krist*, 415 S.W.3d 259, 261–66, 269–71 (Tex. 2013) (affirming no-evidence summary judgment for attorney on former client's legal malpractice claim for an allegedly inadequate settlement amount because client did not present sufficient evidence of damages); *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999) (reversing traditional summary judgment, holding that attorneys did not conclusively prove that clients did not suffer actual damages from attorneys' alleged misconduct prior to obtaining settlement).

Additionally, all other jurisdictions considering the *Muhammad* decision have refused to adopt its reasoning. *See, e.g.*, *Filbin v. Fitzgerald*, 149 Cal. Rptr. 3d 422, 433 (Cal. Ct. App. 2012, review denied) (rejecting "flat prohibition" on post-settlement legal malpractice suits), *citing Viner v. Sweet*, 70 P.3d 1046 (Cal. 2003); *White v. Jungbauer*, 128 P.3d 263, 265 (Colo. App. 2005), *cert. denied*, No. 05SC613, 2006 WL 381672, at *1 (Colo. Feb. 6, 2006); *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195, 199–200 (Conn. 1994); *McCarthy v. Pedersen & Houpt*, 621 N.E.2d 97, 101–02 (Ill. App. Ct.), *leave to appeal denied*, 624 N.E.2d 809 (1993); *Thomas v. Bethea*, 718 A.2d 1187, 1191–95 (Md. 1998) ("The *Muhammad* decision represents a distinct minority view. It is not only inconsistent with most of the cases decided prior to its rendition, none of which are even mentioned in the opinion, but it has been expressly rejected by all of the courts that have had the benefit of considering it."); *Meyer*, 709 N.E.2d at 789–91 & n.12; *Baldridge v. Lacks*, 883 S.W.2d 947, 952 (Mo. Ct. App. 1994) (holding

that *Muhammad* essentially grants attorneys immunity from civil liability in non-fraud-based, post-settlement legal malpractice cases and declining to adopt similar rule), *superseded on other grounds by amended* Mo. Sup. Ct. R. 72.01, *as discussed in Pope v. Pope*, 179 S.W.3d 442, 455–56 (Mo. Ct. App. 2005); *McWhirt v. Heavey*, 550 N.W.2d 327, 334–35 (Neb. 1996) (adopting Connecticut Supreme Court's holding in *Grayson*); *Malfabon v. Garcia*, 898 P.2d 107, 109 (Nev. 1995); *Guido v. Duane Morris LLP*, 995 A.2d 844, 852–54 (N.J. 2010) (reaffirming rejection of *Muhammad* but noting that under certain facts equity could dictate prohibition of post-settlement malpractice suit against attorney), *citing Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992); *see also Edmondson v. Dressman*, 469 So.2d 571, 573–74 (Ala. 1985) (allowing legal malpractice claim to go forward against attorney who allegedly "negligently advised [the plaintiff] to settle her claims for an unreasonable amount"); *Bill Branch Chevrolet, Inc. v. Philip L. Burnett, P.A.*, 555 So.2d 455, 455–56 (Fla. Dist. Ct. App. 1990) (reversing lower court's dismissal of suit for failure to state a claim, holding that "[w]e cannot say as a matter of law that the settlement of this case negates any alleged legal malpractice as a proximate cause of loss"); *Braud v. New England Ins.*, 534 So.2d 13, 14–15 (La. Ct. App. 1988) (determining that only trial on merits was appropriate to resolve allegation that "but for [the Brauds'] attorney's negligence in obtaining the default judgment, they would not have found themselves in the position of having to decide whether to settle for less than they would have received under the default judgment"); *Lowman v. Karp*, 476 N.W.2d

428, 431 (Mich. Ct. App. 1991) ("We agree that plaintiff's settlement of the underlying action should not act as an absolute bar to a subsequent legal malpractice action. We are not persuaded by defendant's argument that such a rule would act to dissuade attorneys from settling cases."); *Cook v. Connolly*, 366 N.W.2d 287, 291–92 (Minn. 1985) (declining to bar post-settlement legal malpractice causes of action, holding that "[t]he presence of a prior court-approved minor settlement does not make this malpractice suit different from any other malpractice action on the standard of conduct required of the defendant attorney, although it may be relevant evidence on whether the standard of conduct was met"); *Cohen v. Lipsig*, 459 N.Y.S.2d 98, 99 (N.Y. App. Div. 1983) ("A cause of action for legal malpractice is viable despite the plaintiff's settlement of the underlying action where such settlement was compelled because of the mistakes of the defendant, the plaintiff's former counsel."); *Crowley*, 488 S.E.2d at 334–35 (reversing summary judgment on post-settlement legal malpractice claim).

We likewise decline to adopt a minority position that even the courts in the same state do not rely upon so broadly. Here, Sandra has alleged that appellees negligently failed to inform her that she could have attempted to seek to have the trial court order Paul to pay the fees for a property valuation expert so that her settlement—although voluntary—was not made with full knowledge of her rights and the law. *Cf. Byrd*, 891 S.W.2d at 699 ("As Kassie's attorney, Woodruff knew, or should have known, of the facts and circumstances surrounding the judgment

and creation of the trust. Woodruff was as competent as Kassie, if not more so, to evaluate the fairness of the settlements and the creation of the trust."). We conclude that, based on these specific allegations, allowing a legal malpractice claim to go forward against appellees would not discourage settlement or violate the public policy of the State of Texas. *See Kramer*, 508 S.W.3d at 227 (acknowledging Texas's preference for disputes to be adjudicated on the merits). Therefore, the trial court erred by granting summary judgment on Sandra's legal malpractice claim on this ground.

We sustain Sandra's second issue.

Breach of Contract Claim Barred By Anti-Fracturing Rule

In her third issue, Sandra challenges the trial court's order granting appellees' summary judgment on her breach of contract claim because she contends that it is not barred by the anti-fracturing rule as urged by appellees in their motion for summary judgment.

The anti-fracturing rule is based on the nature of a professional negligence claim. *See J.A. Green Dev. Corp. v. Grant Thornton, LLP*, No. 05-15-00029-CV, 2016 WL 3547964, at *6 (Tex. App.—Dallas June 28, 2016, pet. denied) (mem. op.). In such a claim, the gravamen of the complaint focuses on the quality or adequacy of the attorney's representation. *Id.* For the anti-fracturing rule to apply, then, to bar a claim pled in the alternative to a legal malpractice claim, the crux of that complaint must focus on the quality or adequacy of the attorney's representation. *See Echols v. Gulledge & Sons, LLC*, No. 10-13-00419-CV,

2014 WL 4629056, at *4 (Tex. App.—Waco Sept. 11, 2014, pet. denied) (mem. op.); *Murphy v. Gruber*, 241 S.W.3d 689, 692–93 (Tex. App.—Dallas 2007, pet. denied); *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

We conclude and hold that Sandra's breach of contract complaint is nothing more than a recasting of her legal malpractice claim. The gravamen of her complaint—that appellees failed to properly investigate the underlying facts of the divorce, failed to properly prosecute and manage the divorce, and gave her erroneous legal advice and opinions—indisputably focuses on the quality or adequacy of appellees' representation of her in the divorce resulting in the agreed decree. Thus, that complaint is barred by the anti-fracturing rule. *See Won Pak*, 313 S.W.3d at 457–59; *Fitts v. Richards-Smith*, No. 06-15-00017-CV, 2016 WL 626220, at *11 (Tex. App.—Texarkana Feb. 17, 2016, pet. denied) (mem. op.). We overrule her third issue.

Conclusion

Having overruled Sandra's third issue, we affirm the summary judgment on her breach of contract claim. But having sustained her first and second issues, we reverse the summary judgment on her legal malpractice claim and remand the case to the trial court for further proceedings on that claim.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER, J.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

WALKER, J., filed a concurring opinion.

DELIVERED: June 22, 2017