

NO. 07-07-0242-CV  
IN THE COURT OF APPEALS  
FOR THE SEVENTH DISTRICT OF TEXAS  
AT AMARILLO  
PANEL D  
AUGUST 27, 2008

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MARSHALL CAPPS, IN HIS CAPACITY AS THE GUARDIAN  
OF THE ESTATE OF LAZARO SANTA CRUZ, APPELLANT

V.

STATE OF TEXAS, BY AND THROUGH TEXAS DEPARTMENT  
OF STATE HEALTH SERVICES, APPELLEE

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FROM THE COUNTY COURT OF WILBARGER COUNTY;

NO. 116; HONORABLE DON R. WINDLE, JUDGE<sup>1</sup>

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Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

**MEMORANDUM OPINION**

Appellant, Marshall Capps, in his capacity as the Guardian of the Estate of Lazaro Santa Cruz, appeals the trial court's denial of his motion for summary judgment and the

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<sup>1</sup>Honorable Don R. Windle, Judge Presiding, Probate Court of Denton County, sitting by assignment. Tex. Gov't Code Ann. § 25.0022(h) (Vernon Supp. 2007).

rendition of summary judgment in favor of Appellee, the State of Texas, by and through the Department of State Health Services, in Capps's petition for bill of review which sought to set aside an agreed judgment previously rendered in favor of Appellee, and his petition seeking recovery of damages. By one issue, Capps asserts the trial court erred in granting the State's motion for summary judgment because (1) Santa Cruz had a meritorious defense, (2) that he was prevented from asserting because of the State's extrinsic fraud and wrongful acts, and (3) the failure to raise his meritorious defense was not due to his own fault or negligence. We affirm.

### **Background**

In 1980, Santa Cruz was involuntarily committed to the care of the state hospital system pursuant to provisions of the Texas Code of Criminal Procedure.<sup>2</sup> For fourteen years, he received Social Security benefits while the State acted as his representative payee. During this period, the State used a portion of Santa Cruz's Social Security benefits as compensation for his support, maintenance, and treatment. The remainder, \$57.00 per month, was received by Santa Cruz for his personal use. In addition, he earned \$400 per week working as a janitor in two state hospitals as part of their client work program. Santa Cruz saved portions of his monthly personal allowance and janitorial

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<sup>2</sup>See Act of May 29, 1975, 64<sup>th</sup> Leg., R.S., ch. 415, 1975 Tex. Gen. Laws 1095 (current version at Tex. Code Crim. Proc. Ann. arts. 46C.001 - 46C.270 (Vernon 2006 & Supp. 2007)).

wages first in a client trust account through the State, and later through a private bank account at the Citizens 1<sup>st</sup> Bank in Rusk, Texas.

From July 1988 through January 1996, Vernon State Hospital (VSH) notified Santa Cruz of the amount of his monthly fee for support, maintenance, and treatment. The charge was based, in part, on his monthly Social Security benefit and ran between \$500 and \$700 per month. In January 1996, Santa Cruz received his last notification indicating his monthly fee was \$704.

In July 1996, the Social Security Administration terminated Santa Cruz's benefits. In January 1997, the State filed an application for the appointment of a guardian for Santa Cruz's estate. Six months later, Capps, an attorney licensed to practice law in Texas, was appointed guardian. In December 1997, Capps filed an inventory indicating Santa Cruz had accumulated \$58,065.42 in his Citizens 1<sup>st</sup> Bank account.

In February 1998, VSH submitted a verified claim to Capps for \$102,960 representing VSH's costs for Santa Cruz's support, maintenance, and treatment for the year ending December 31, 1997. This claim was based on a monthly fee of \$8,580. Capps did not act on the State's claim within the thirty day period prescribed by statute and the State filed a petition seeking payment. Capps responded with a general denial. Thereafter, the State filed requests for admission and later a motion for summary judgment seeking full reimbursement.

In December 1998, four days prior to a hearing on the State's motion for summary judgment, Capps filed an application for authority to employ an attorney to file a petition in bankruptcy on behalf of Santa Cruz's estate. The trial court issued an order appointing Ronald Yandell and, three days later, Capps filed a petition in bankruptcy on behalf of Santa Cruz.

Two months later, in February 1999, Capps filed an application for authority to dismiss the bankruptcy action and settle the State's \$102,960 claim for \$43,000. The application indicated Yandell advised Capps that accepting the State's proposal of \$43,000 would leave more property remaining in Santa Cruz's estate than would remain if the bankruptcy were pursued to conclusion. Capps's application concluded that, accepting the State's offer, was in the estate's "best interests," "necessary and advisable to protect" the estate and "provide the future care and support" for Santa Cruz.

In March 1999, the trial court entered an agreed judgment approved and signed by the State, Capps, and Yandell. The agreed judgment stated, in pertinent part, as follows:

At the hearing on this cause, the attorney of record for Plaintiff and the attorney of record for Defendant announced to the Court that Plaintiff and Defendant have agreed that judgment should be rendered for Plaintiff as agreed, and *in full settlement of claims made by the Plaintiff in its Original Petition filed in this cause*. Having considered the pleadings and official records on file in this cause and the evidence, the Court is of the opinion, and so finds, that it has jurisdiction of the parties and the subject matter herein, *and that Plaintiff has sustained the burden of proof thereon and judgment should therefore be rendered for Plaintiff as agreed*. PLAINTIFF AGREES to compromise and settle its claim in the amount of \$102,960.00 for the sum of \$43,000, to be paid in full by the Defendant within thirty days

(30) after entry of judgment herein. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the State of Texas . . . recover from the Estate of LAZARO SANTACRUZ, and MARSHALL CAPPS, Defendant, in his capacity as guardian . . . the sum of \$43,000 . . . . *All relief not expressly granted herein is denied.*

(Emphasis added).

In November 2000, Capps filed an application to employ an attorney to file the bill of review which is the subject of this appeal. The trial court entered an order approving the application and, a month later, Capps filed a petition to set aside the agreed judgment between Capps and the State. In substance, the bill of review alleged that the State had failed to advise Capps of the availability of a trust fund exemption<sup>3</sup> and other safekeeping procedures that may have sheltered a substantial portion of Santa Cruz's estate from the State's claim for support, maintenance, and treatment.

The parties filed cross-motions for summary judgment and the trial court, the Honorable Gary B. Streit presiding, denied Capps's motion for summary judgment on his second amended petition for bill of review and second amended petition. Capps then

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<sup>3</sup>Section 552.018(a) of the Texas Health & Safety Code states, in pertinent part, as follows:

If a patient is the beneficiary of a trust that has an aggregate principal of \$250,000 or less, the corpus or income of the trust is not considered to be the property of the patient or the patient's estate and is not liable for a patient's support.

The remainder of the statute sets forth the qualifications for such a trust, financial and reporting requirements, and excluded proceedings, accounts and trusts.

moved for assignment of the action to a probate judge and the Honorable Don R. Windle of the Denton County Probate Court, was assigned to hear the case. By agreement of the parties, all claims being asserted by Capps were to be resolved by the resubmission of *Plaintiff's Motion for Summary Judgment and Brief on Plaintiff's Second Amended Petition for Bill of Review and Plaintiff's Second Amended Petition* and by the consideration of *Defendant's Motion for Summary Judgment and Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment on Plaintiff's Second Amended Petition*, as a cross-motion for summary judgment. In the *Final Summary Judgment*, Judge Windle granted the State's motion for summary judgment and denied Capps's motion for summary judgment without specifying the grounds upon which the judgment was based.

## **Discussion**

Capps contends the trial court abused its discretion when it rendered summary judgment in favor of the State. We disagree.

### **I. Standard of Review**

In reviewing a summary judgment, this Court must apply well-established standards which are: (1) the movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (3) every reasonable

inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997) (citing *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985)). We review the trial court's summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

Furthermore, when the motion for summary judgment is based on several different grounds and the order granting summary judgment does not specify or state the grounds relied on, the summary judgment will be affirmed on appeal if any of the grounds presented in the motion are meritorious. *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

For a party to prevail on a motion for summary judgment, that party must conclusively establish the absence of any genuine question of material fact and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). To establish entitlement to judgment as a matter of law, a movant must either prove all essential elements of his claim or defense, *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986), or negate at least one essential element of the non-movant's cause of action. *Shaw v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001); *Randall's Food Mkts, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). Once the movant has established a right to summary judgment, the non-movant has the burden to respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d

671, 678 (Tex. 1979); *Barbouti v. Hearst Corp.*, 927 S.W.2d 37, 64 (Tex.App.–Houston [1st Dist.] 1996, writ denied).

## **II. Bill of Review**

Because they involve the same claim or cause of action, we analyze Santa Cruz's original petition and petition for bill of review together. A bill of review is an equitable proceeding to set aside a judgment that is not void on its face but can no longer be challenged by motion for new trial or appeal. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004); *King Ranch Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), *cert. denied*, 541 U.S. 1030, 124 S.Ct. 2097, 158 L.Ed.2d 711 (2004). The fact that an injustice has occurred is not sufficient to justify bill of review relief. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999). A bill of review is designed to prevent manifest injustice. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 998 (1950).

To prevail on his bill of review, Santa Cruz was required to plead and prove (1) a meritorious claim or defense to the underlying cause of action, (2) that he was prevented from making due to the fraud, accident or wrongful act of his opponent, and (3) that he was not at fault or negligent.<sup>4</sup> *Caldwell*, 154 S.W.3d at 96; *Hagedorn*, 226 S.W.2d at 998. This preliminary showing of entitlement is essential in order to assure that valuable judicial

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<sup>4</sup>Negligence of a party's counsel is attributed to that party for purposes of the third element of a bill of review. *Perdue v. Patten Corp.*, 142 S.W.3d 596, 605 (Tex.App.–Austin 2004, no pet.).



resources will not be wasted by conducting a spurious “full-blown” examination on the merits. *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979).

In the context of a bill of review, a defendant is entitled to a summary judgment against the proponent of the bill of review if he can establish, as a matter of law, the absence of any of these three elements. *Hartsfield v. Wisdom*, 843 S.W.2d 221, 223 (Tex.App.–Amarillo 1992, pet. denied) (citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 311-12 (Tex. 1984)). Appellee contends the trial court did not err in granting its’ motion for summary judgment, or in denying Santa Cruz’s motion for summary judgment, because Santa Cruz cannot establish, as a matter of law, at least one essential element of his cause of action. See *Shaw v. Moss*, 67 S.W.3d at 842.

#### **A. Meritorious Claim of Defense**

For purposes of our analysis we will assume, without finding, that Capps has plead a meritorious defense to the underlying cause of action and has raised, by competent summary judgment evidence, more than a scintilla of evidence to prove those allegations.

#### **B. Fraud, Accident or Wrongful Act**

In addition to a meritorious defense, Santa Cruz must also establish that he was prevented from making that defense by the fraud, accident or wrongful act of the Appellee. Furthermore, that fraud must be extrinsic fraud, as opposed to intrinsic fraud, in order to prevail on his petition for bill of review. *King Ranch*, 118 S.W.3d at 752; *Tice v. City of*

*Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989). Extrinsic fraud “is fraud that denie[s] a party the opportunity to fully litigate at trial all the rights and defenses that could have been asserted,” *King Ranch*, 118 S.W.3d at 752, and includes “wrongful conduct practiced outside the adversary trial—such as keeping a party away from court, making false promises of compromise, denying a party knowledge of the suit—that affects the manner in which the judgment is procured.” *Ince v. Ince*, 58 S.W.3d 187, 190 (Tex.App.—Waco 2001, no pet.) (citing *Hagedorn*, 226 S.W.2d at 1002). Extrinsic fraud is “collateral” fraud in the sense that it must be “collateral” to the matter actually tried and not something which was actually or potentially in issue in the trial. *Montgomery*, 669 S.W.2d at 312.

In contrast, intrinsic fraud “relates to the merits of the issues which were presented and presumably were or should have been settled in the former action.” *Tice*, 767 S.W.2d at 702. Intrinsic fraud “is inherent in the matter considered and determined in the trial where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated there.” *Montgomery*, 669 S.W.2d at 313.

Here, Capps seeks to set aside an agreed judgment on the State’s claim for costs related to Santa Cruz’s support, maintenance, and treatment incurred in 1997. As such, the agreed judgment represents a judgment on the merits of the State’s claim and is “conclusive, not only on matters actually litigated, but it is also conclusive on every other matter that could have been litigated and decided as an incident to or essentially

connected with the subject matter of the prior litigation.” *Freeman v. Cherokee Water Co.*, 11 S.W.3d 480, 483 (Tex.App.–Texarkana 2000, no pet.). Further, agreed judgments are contracts that end all controversy between the parties. *Pate v. Pate*, 874 S.W.2d 186, 188 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1994, writ denied). Thus, intrinsic fraud, here, would encompass any legal claim or defense available to Capps including any alleged fraud by the State that pertained to any issue related to the State’s claim for reimbursement that *was, or could have been litigated*, in the State’s claim proceeding.

Before and after the State initiated its claim, Capps contends the State misled and/or failed to advise either Santa Cruz or himself of the availability of trust fund accounts and/or other safekeeping procedures which, if implemented, might have sheltered a substantial portion of Santa Cruz’s estate from the State’s claim. Specifically, Capps asserts that the State miscalculated Santa Cruz’s monthly fee for 1997, failed to give Santa Cruz notice of the 1997 fee increase, and failed to advise Capps that \$50,000 of Santa Cruz’s estate could have been exempt from claims for reimbursement under section 552.018 of the Texas Health & Safety Code if the funds had been placed in a trust. Whether the State’s claim was subject to reduction or elimination due to a miscalculation, failure to give notice of a fee change, or failure to inform Capps of a statutory trust exemption goes to the very essence of the validity and/or amount of the State’s claim. These issues could have been litigated in the State’s original claim proceeding. As such, Capps alleges intrinsic fraud as opposed to extrinsic fraud. *See, e.g., In re the Office of*

*the Attorney General*, 193 S.W.3d 690, 693 (Tex.App.–Beaumont 2006, no pet.); *McIntyre v. Wilson*, 50 S.W.3d 674, 680 (Tex.App.–Dallas 2001, pet. denied).

Capps also claims the State owed Santa Cruz and/or Capps a fiduciary duty as Santa Cruz's caretaker and breached that duty by failing to advise Capps of a change in Santa Cruz's monthly fee or his legal rights regarding a possible trust exemption. In Texas, the law recognizes that there is no duty to inform others of the requirements of the law because all persons are presumed to know the law. *E. H. Stafford Mfg. Co. v. Wichita School Supply, Co.*, 112 Tex. 650, 23 S.W.2d 695, 697 (1930). Nevertheless, if the State had any duty to advise Santa Cruz or Capps pursuant to an existing fiduciary relationship and failed in that duty, the breach of such a duty could have been alleged and litigated in the State's claim proceeding. Thus, these claims are also intrinsic fraud allegations. Because Capps could have litigated these claims in the original action, the agreed judgment is *res judicata* as to all these claims. See *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2008); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992).

After Capps was appointed guardian and the State filed its certified claim, Capps asserts State representatives informed him on several occasions that he could do nothing to prevent VSH from seeking reimbursement from Santa Cruz's earnings and they were unaware of any defenses to the State's claim. After Capps's appointment and the State initiated an adversarial proceeding against Santa Cruz's estate, no fiduciary relationship

existed between the State and Capps that required the State to give Capps legal advice on how to defend against the State's claim and/or shelter Santa Cruz's assets. See *Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 622 (Tex.App.—Texarkana 2002, pet. denied). Moreover, the State representatives' statements to Capps to the effect that he could do nothing to prevent VSH from seeking reimbursement from Santa Cruz's earnings or that they were unaware of any defenses to the State's claim were, at most, legal opinions—not fraudulent misrepresentations. See *Taub*, 75 S.W.3d at 621-22. As such, the statements are not actionable. *Id.*

Capps does not assert, and the record does not support, any allegation that he was denied an opportunity to investigate any facts related to the amount or validity of the State's claim. Rather, Capps contends simply that the State failed to give him certain legal advice. As guardian and attorney for the estate,<sup>5</sup> see *Insurance Company of North America v. Westergren*, 794 S.W.2d 812, 814-15 (Tex.App.—Corpus Christi 1990, orig. proceeding [leave denied]), Capps was equally or, in most cases, better versed in the law than the State representatives with whom he spoke and certainly more qualified and motivated to undertake legal research to determine the defenses available to his ward and client.

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<sup>5</sup>Throughout the guardianship proceedings, Capps submitted his fee bills on his law firm stationary signed by "Marshall Capps, Attorney at Law," and charged Santa Cruz's estate \$120.00 per hour for his services. He also submitted a bill labeled "Attorney fees" for investigating defenses to the State's claim, drafted and filed an answer in response to the State's claim in addition to other pleadings.

Santa Cruz's reliance on *Jones v. Texas Department of Protective and Regulatory Services*, 85 S.W.3d 483 (Tex.App.–Austin 2002, pet. denied) is inapposite. In *Jones*, petitioner sought a bill of review and alleged she involuntarily signed an affidavit relinquishing her parental rights because of representations by state representatives that, if she did sign, her daughter would be placed with her cousin. *Id.* at 492-93. Her attorney was not present when she signed the affidavit. *Id.* Subsequently, her daughter was not placed with her cousin but in foster care. 85 S.W.3d at 486. Here, the State made no misrepresentations of fact to either Santa Cruz or Capps and Santa Cruz's interests were represented by his guardian and attorney, Capps, and a second attorney, Yandell, at the signing of the agreed judgment.

Intrinsic issues underlying a judgment attacked by a bill of review have no probative value on the type of fraud necessary to support a bill of review, *King Ranch*, 118 S.W.3d at 752, because each party must guard against adverse findings on issues directly presented for decision. See *Boaz v. Boaz*, 221 S.W.3d 126, 131 (Tex.App.–Houston [1<sup>st</sup> Dist.] 2006, no pet.). At most, Capps's allegations assert intrinsic fraud. As such, Capps should have "litigated the question[s] at the time rather than join in having judgment entered against him and [permitting it] to become final before deciding to litigate it by bill of review." *McIntyre*, 50 S.W.3d at 694 (quoting *Pollard v. Steffens*, 161 Tex. 594, 343 S.W.2d 234, 240 (1961)). Accordingly, because Capps does not allege extrinsic fraud but rather only argues intrinsic fraud, as a matter of law, he cannot successfully maintain a bill of review on these grounds.

### **C. Negligence**

Having concluded that Santa Cruz was not prevented from asserting a defense by extrinsic fraud, we need not decide whether his petition seeking to set aside the agreed judgment also fails to demonstrate that he is without fault or neglect.

### **Conclusion**

Capps had the burden of proof on the issue of extrinsic fraud and his failure to make a *prima facie* case defeats his action for a bill of review. Capps's issues are overruled and the trial court's judgment is affirmed.

Patrick A. Pirtle  
Justice