



**NUMBER 13-15-00185-CV**

**COURT OF APPEALS**

**THIRTEENTH DISTRICT OF TEXAS**

**CORPUS CHRISTI - EDINBURG**

---

---

**RICHARD ALAMIA,**

**Appellant,**

**v.**

**ANDRES LOZANO,**

**Appellee.**

---

---

**On appeal from the County Court at Law No. 4  
of Hidalgo County, Texas.**

---

---

## **MEMORANDUM OPINION**

**Before Justices Contreras, Benavides, and Longoria  
Memorandum Opinion by Justice Benavides**

By two issues, appellant Richard Alamia appeals a legal malpractice judgment rendered against him. Alamia argues that (1) the evidence is legally insufficient to support the verdict against him and (2) judicial estoppel should apply to appellee Andres Lozano's testimony during the malpractice trial. We affirm.

## I. BACKGROUND

### A. Prior Cause of Action

In order to properly address the merits of Lozano's legal malpractice case, we will discuss the relevant facts and disposition of the underlying case.<sup>1</sup> See *Lozano v. Yeary*, No. 13-11-00136-CV, 2013 WL 268941 (Tex. App.—Corpus Christi Jan. 24, 2013, no pet.) (mem. op., not designated for publication). Lozano is the president of Sandia Depot, Inc. (Sandia Depot), a corporation involved in the import and export of watermelons. Lozano entered into a verbal contract with Ray Yeary of Sky Farms, Inc. (Sky Farms), in which Sandia Depot would supply watermelon seeds and supplies to Sky Farms, which would grow the watermelons, and Sandia Depot would take the watermelons and sell them. Upon sale, Sandia Depot would deduct its expenses up front, take a commission from the remaining profits, and pay Sky Farms the remaining money.

In 2009, Lozano hired attorney Alamia to file a breach of contract action against Yeary and Sky Farms. Alamia filed suit naming the plaintiff as Andres Lozano, "individually d/b/a Sandia Depot," and naming defendants Yeary individually, and d/b/a Sky Farms, Inc. Although Alamia filed an amended petition during the course of the lawsuit, Alamia did not modify the plaintiff's name in the lawsuit. Lozano contends the proper plaintiff was Sandia Depot, not Lozano individually. Sky Farms filed a counterclaim and verified denial asserting Yeary was not liable in an individual capacity.

---

<sup>1</sup> The underlying lawsuit was previously appealed to this Court in cause number 13-11-00136-CV. The jury verdict in favor of Sky Farms, Inc. was affirmed. See *Lozano v. Yeary*, No. 13-11-00136-CV, 2013 WL 268941 (Tex. App.—Corpus Christi Jan. 24, 2013, no pet.) (mem. op., not designated for publication).

Alamia failed to file any response to the counterclaim.

The case proceeded to trial and the jury found in favor of Sky Farms and awarded a \$240,996.57 judgment against Lozano in his individual capacity. Lozano appealed the judgment to this Court and raised a legal sufficiency of evidence and sufficiency of damages challenge. This Court affirmed the judgment of the trial court. *See id.*

## **B. Current Cause of Action**

Following the jury verdict in favor of Sky Farms, Lozano filed this suit against Alamia alleging a cause of action for legal malpractice. Lozano's pleadings allege that Alamia was negligent by filing the case naming Lozano in his individual capacity, rather than his corporation as the plaintiff. Alamia also did not file any discovery requests, respond to the counterclaim or verified denial, or amend the original petition to shield Lozano from personal liability.

At a trial before a jury, Alamia, Lozano, and Gary Patterson, an expert witness attorney, testified. During Alamia's direct testimony, Lozano offered evidence that showed that Alamia initially sent Yeary a pre-trial demand letter, which identified his client as Sandia Depot, with attached accounting documents also listing Sandia Depot. Alamia admitted he did not file a verified denial on Sky Farms' counterclaim. Alamia also admitted he "got it wrong" by filing the lawsuit in Lozano's individual capacity, instead of under Sandia Depot's corporate capacity.<sup>2</sup>

---

<sup>2</sup> The record also shows that Alamia or his staff filed a discovery response to Sky Farms that appeared to show a forged version of Lozano's signature. Alamia admitted on the record when questioned that the signature purporting to be Lozano's did not match Lozano's verified signature on other documents. The discovery response was notarized by a member of Alamia's staff. The discovery response was admitted into evidence before the jury.

However, Alamia also claims that Lozano was apprised of the lawsuit every step of the way by either himself or his staff. Alamia claims Lozano was given a copy of the original and amended petitions, was apprised of the settlement offer of \$150,000 made by Sky Farms and rejected by Lozano, and that Lozano told Alamia's staff that he wanted to proceed in the lawsuit individually, instead of as Sandia Depot. Alamia also claimed that, even though Lozano had him draw up corporate documents in the past, Lozano did not operate as a corporation<sup>3</sup> and the verbal contract with Sky Farms in the underlying dispute was done in an individual capacity.

On cross-examination, Alamia defended his decision to file the lawsuit in Lozano's individual capacity because he stated that none of the evidence presented by Lozano showed that Sandia Depot entered into the agreement with Sky Farms. Alamia also testified that he did not file requests for discovery to Sky Farms because it was normally a "professional courtesy" to turn over the necessary documents. Alamia argued that Lozano turned over two sets of invoices when requested by Sky Farms, and the differences in the sets of invoices are what caused Lozano to lose his case.

Lozano testified that he decided to incorporate his business for liability purposes and Alamia had previously drafted the necessary documents for him and admitted the articles of incorporation for Sandia Depot, filed with the Texas Secretary of State, into evidence. Lozano stated that even though Alamia had handled multiple lawsuits on his behalf, Lozano never spoke to Alamia directly, only to his staff. Lozano testified that his

---

<sup>3</sup> Alamia claimed Lozano never properly initiated the "corporate structure" and therefore, could not operate as a corporation. Patterson and Lozano disputed Alamia's interpretation of operating as a corporation.

business was conducted as Sandia Depot, and he acted in his capacity as the president. The agreement involved in the underlying case was between Sandia Depot and Sky Farms, and any checks written were out of Sandia Depot's account, according to Lozano. Lozano also contradicted Alamia's testimony and said he was never given a copy of the original petition, amended petition, or counterclaim and did not know he had been countersued until the trial. Lozano also claimed he first heard of Sky Farms' offer of \$150,000 by Alamia's staff after it had been rejected by Alamia. Lozano told jurors that he would have accepted the offer had he been notified.

Patterson also testified as an expert witness on behalf of Lozano. Patterson is a licensed lawyer and testified he was familiar with the standard duty of care required by attorneys. After reviewing the documents in this case, Patterson was of the opinion that Alamia's original petition lacked due diligence or competency. Patterson also spoke about ways Alamia could have corrected the mistakes in the original or amended petition. It was Patterson's opinion that the lawsuit was brought improperly and that Alamia's breach of his duty was the proximate cause of the judgment rendered against Lozano.

The jury found in favor of Lozano and awarded damages in the amount of \$285,996.52 against Alamia. Alamia filed a motion to reform the judgment or for a new trial which was denied by the trial court. This appeal followed.

## **II. LEGALLY SUFFICIENT EVIDENCE**

By his second issue, which we will address first, Alamia argues the evidence was legally insufficient to support the jury's verdict.

### **A. Standard of Review**

In reviewing a legal sufficiency issue, a court reviews the evidence in a light most

favorable to the trial court's judgment and indulges every reasonable inference to support the judgment. See *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). A sufficiency challenge will be sustained if: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Id.* at 810. More than a scintilla of evidence exists if the evidence allows for reasonable minds to reach differing conclusions about a vital fact's existence. See *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782–83 (Tex. 2001).

#### **B. Applicable Law**

In order to “prevail on a legal malpractice claim, a plaintiff must show ‘that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff’s injuries, and (4) damages occurred.’” *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 117 (Tex. 2004) (quoting *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995)). “When the plaintiff’s allegation is that some failure on the attorney’s part caused an adverse result in prior litigation, the plaintiff must produce evidence from which a jury may reasonably infer that the attorney’s conduct caused the damages alleged.” *Id.*

Breach of the standard of care and causation are separate inquiries, however, and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other. *Id.* at 118. Thus, even when negligence is admitted, causation is not presumed. *Id.* Moreover, the trier of fact must have some basis for understanding the causal link between the attorney’s negligence and the client’s harm. *Id.*

“Legal malpractice may include an attorney’s failure to exercise ordinary care in preparing, managing, and presenting litigation.” *Id.* at 119. However, decisions on which witnesses to call, what testimony to obtain or when to cross-examine almost invariably are matters of professional judgment. *Id.* In order to fully understand tactical decisions, it is normally necessary to have expert testimony. *Id.* at 120.

### **C. Discussion**

Alamia initially argues “no duty” because no attorney-client relationship existed between himself and Lozano. Alamia argues that he represented Sandia Depot, not Lozano individually and therefore, Alamia owed no duty to Lozano. “An attorney-client relationship must exist before an attorney is obligated to provide proper legal services.” *Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380, 383 (Tex. App.—Corpus Christi 1994, no writ). Despite Alamia’s argument on appeal, Alamia testified on direct examination that “Sandia Depot and Andres Lozano were my clients” and that he “represent[s] Andres Lozano and Sandia Depot.” Alamia himself establishes he considered Lozano a client and therefore, owed him a duty as a client. The first requirement to establish malpractice is supported by sufficient evidence.

Having established the evidence was sufficient to show a duty was owed, we examine if there was sufficient evidence that Alamia breached his duty to Lozano. See *Alexander*, 146 S.W.3d at 117. Attorneys have a duty to their clients. See *Yaklin*, 875 S.W.2d at 383. Patterson testified as a legal expert regarding what requirements attorneys are expected to uphold for their clients. Patterson also explained the purpose of incorporating a business and how incorporation protects an individual from personal liability. Additionally, Patterson stated he saw no attempt in terms of pleadings by Sky

Farms to “bust” the corporate shield. Patterson testified, in his opinion, that the original petition showed a lack of due diligence and competency in the way it was written and filed; he explained that the style of the case and the party listed in the body of the petition were not the same. Patterson explained to the jury that the petition must be specific because it “is what’s driving the entire lawsuit.” Patterson also testified that even if mistakes are made in the original petition, an attorney can ask for a trial amendment to correct a mistake that was missed, and also noted that no corrections occurred in Lozano’s case. Patterson also agreed with Lozano that there was evidence that Sandia Depot was incorporated based on what he reviewed prior to trial, and he also stated he saw no evidence that Lozano ever paid for any of the transactions with Sky Farms in an individual capacity. He also explained to the jury what a verified denial is, how a party can use it to deny liability if being sued in the wrong capacity, and how not filing the denial can waive any defense, which is what happened in Lozano’s case according to Patterson. Patterson also testified that Alamia should have conveyed any settlement offers and rejections of those offers in writing in order to have proper documentation and evidence.

Lozano additionally testified that he hired Alamia on behalf of Sandia Depot, as its corporate representative. Alamia knew or should have known that Lozano is Sandia Depot’s corporate representative, since he handled the incorporation documents for Lozano. Lozano also testified that he never met with Alamia, just members of his staff prior to trial and was not kept aware of the proceedings in the lawsuit. Additionally, Alamia agreed that he filed no discovery requests or verified denials in the countersuit, and failed to make the proper trial amendments. Accordingly, we hold that the record is legally sufficient to establish that Alamia breached his duty to Lozano. See *id.*



Next, Lozano is required to show the breach was the proximate cause of his injuries. Not only did Patterson testify to the deficiencies and Alamia's breach of his duty of representation, but he also opined that the lawsuit was improperly brought by naming Lozano in an individual capacity. Patterson explained to the jury that a corporation without assets is judgment-proof, and if the lawsuit had been properly filed, Lozano would not have been individually liable for the judgment. Patterson summed up his testimony by stating attorneys that do not properly communicate with clients or prepare adequately for trial are in breach of their duty owed to the client. Patterson stated he felt Alamia breached the standard of care required by attorneys and Alamia's breach of his duty to Lozano was the proximate cause of the judgment against Lozano due to the lawsuit being filed in Lozano's individual capacity.

In addition to Patterson's testimony, Alamia's own testimony showed lack of diligence in the Lozano lawsuit. Alamia testified first about the rules of professional conduct and duty of competence expected from lawyers. Alamia testified that Lozano, on behalf of Sandia Depot, hired him to sue Sky Farms. Alamia's initial demand letter to Sky Farms, which was entered into evidence, identifies the client as Sandia Depot and Alamia agreed that all the attached accounting documents to the demand letter also referenced Sandia Depot instead of Lozano. When testifying about his failure to file a verified denial, in response to Lozano's question of, "Meaning, you got it wrong, it's not Mr. Lozano, individually, it's Sandia Depot, Inc., right?", Alamia's response was "That's correct." Alamia also explained that his staff interacted mainly with Lozano because he is a "busy trial attorney." Alamia also testified that he felt discovery requests were not needed because it was customary to turn over documents, even though he agreed that

filing certain requests could have cleared up any mistakes regarding the parties to the lawsuit. Alamia continued to claim that Sandia Depot was not a proper corporation because Lozano had not “initiated the corporate structure,” even though Lozano’s evidence showed the articles of incorporation were on file with the Secretary of State. The testimony of Patterson and Alamia alone provide legally sufficient evidence of the third requirement. *See id.*

Lastly, Lozano must show that he incurred damages to establish a malpractice claim. After the initial trial, Lozano was individually responsible for \$240,996.57 judgment and paid the damages in full to Sky Farms. Alamia made the decision to name Lozano individually and to not file any amended petitions naming Sandia Depot as a party to the lawsuit. Based on this, the evidence is legally sufficient to establish the fourth element of Lozano’s malpractice claim. Therefore, Lozano met all the requirements to establish a malpractice claim.

Based on the testimony presented to the jury, Alamia’s decision to file the lawsuit against Sky Farms in Lozano’s individual capacity was the cause of the judgment against Lozano. Lozano is not required to show that he would have prevailed if the lawsuit had been properly filed naming Sandia Depot as the plaintiff, only that but for Alamia’s breach of duty, the outcome would have been different. *See id.* Even if Sandia Depot had lost in the initial lawsuit, Lozano would not have been individually liable if the lawsuit had been properly filed naming Sandia Depot as the plaintiff. We overrule Alamia’s second issue.

### **III. JUDICIAL ESTOPPEL**

By his first issue, Alamia argues judicial estoppel should apply to Lozano’s testimony, which Alamia claims changed between the underlying trial and the malpractice

trial.

### **A. Applicable Law**

Judicial estoppel requires that: “(1) a sworn, inconsistent statement be made in a prior judicial proceeding; (2) the party making the statement gained some advantage by it; (3) the statement was not made inadvertently or because of mistake, fraud, or duress; and (4) the statement was deliberate, clear, and unequivocal.” *Galley v. Apollo Associated Servs., Ltd.*, 177 S.W.3d 523, 528–29 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Additionally, “judicial estoppel is an affirmative defense, and must be specifically pled.” *Gulf States Abrasive Mfg., Inc. v. Oertel*, 489 S.W.2d 184, 187 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

“Judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage.” *Ferguson v. Building Materials Corp. of Am.*, 295 S.W.3d 642, 643 (Tex. 2009). “Accordingly, a party cannot be judicially estopped if it did not prevail in a prior action.” *Id.* “The doctrine is not intended to punish inadvertent omissions or inconsistencies but rather to prevent parties from playing fast and loose with the judicial system for their own benefit.” *Id.* “Judicial estoppel most clearly applies where a party attempts to contradict its own sworn statements made in prior litigation.” *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 649 (Tex. App.—El Paso 1997, pet. ref’d). “The essential function and justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means of obtaining an unfair advantage.” *Id.* at 650.

## B. Discussion

In the underlying case, Lozano gave the following testimony:

Defense: Did you contract with Mr. Yearly in 2008 to plant watermelons?

Lozano: Correct, yes.

.....

Defense: Did you ever pay for any of the harvest of those watermelons?

Lozano: Who did?

Defense: You.

Lozano: Yes, I did.

Defense: Okay. So you not only expended money for purchasing watermelon seed, you also expended money for purchasing watermelon planting; is that correct?

Lozano: Correct.

Defense: And you also expended money for some of the growing of crops?

Lozano: Correct.

Defense: And you also paid for the harvest?

Lozano: Correct.

Defense: And you paid for marketing the melons?

Lozano: Correct.

Defense: And you kept all the money that you got from the proceeds of the sale of those melons?

Lozano: Correct.<sup>[4]</sup>

---

<sup>4</sup> The testimony from the underlying trial was taken from the opinion in *Lozano v. Yearly*, 2013 WL 268941, and quoted in the briefs of Alamia and Lozano.

In the present trial, Lozano was asked about the testimony:

Alamia: Okay. And these questions were directed to you by Sky Farms' attorney, is that right?

Lozano: Yes, sir.

Alamia: At the trial; is that correct?

Lozano: That's – yes.

Alamia: Okay. And the question was directed to you as an individual–

Lozano: No, sir.

Alamia: –remember that?

Lozano: No, sir, he didn't say individual.

Alamia: Well, that's the transcript. I'm just reading from the questions you responded to.

. . . .

Alamia: –on Page 5, if that question was asked to you as an individual, and you said, Yes. Is that true?

Lozano: It says on the paper. It says on the paper.

Alamia: Is that true?

Lozano: Maybe it is.

Alamia: Okay. That you responded that it was as an individual capacity; is that true?

Lozano. Yes, sir.

On redirect examination, Lozano was questioned by his counsel.

Counsel: Mr. Lozano, when Mr. Alamia asked you, when you were on the stand, at the very beginning, he asked you if you had a verbal agreement with Mr. Yearly. Remember that question?

Lozano: Correct. Yes.

Counsel: All right. And you answered in the affirmative, remember that?

Lozano: Yes.

Counsel: All right. Did you mean you, individually, or did you mean you, as the president of Sandia Depot, Inc.?

Lozano: President of Sandia Depot.

.....

Regarding a transcript from the underlying case that Alamia questioned Lozano with,

Lozano testified as follows:

Counsel: And he [Alamia] asked you about the word "individual" here, right?

Lozano: Correct. Uh-huh.

Counsel: Do you see the word "individually" anywhere in that area, that's up here? I'm talking about with regard to the question where this document says, Did you contract with Mr. Yearly in 2008 to plant watermelons? And you said, Correct. You said, Yes, right?

Lozano: Yes. Uh-huh.

Counsel: He didn't ask you if you did, individually, did he?

Lozano: No, sir.

Counsel: None of these questions say, Did you, individually, do they?

Lozano: No, sir.

.....

Counsel: All right. And so even though you said, Yes, correct, did you mean you, individually, or did you mean you, as president of Sandia Depot, Inc.?

Lozano: Me as president of Sandia Depot.

Counsel: Why did you say, Correct?

Lozano: Well, he was saying that he had the paperwork.

Counsel: Because you assumed he was asking you in the capacity as president?

Lozano: Yes, sir.

. . . .

Counsel: All right. Did Mr. Alamia, ever, after those questions by Mr. Dyer [Yeary's counsel], come and ask you, just like I'm asking you, Mr. Lozano, when you responded to those questions, did you mean you personally, instead of Sandia Depot, Inc.? Did he ever ask you that question?

Lozano: No, sir.

. . . .

Counsel: Have you ever, since 2000—since the company has been in a corporation, ever purchased watermelons or acted for the sale of watermelons or marketing watermelons, done it individually as Andres Lozano?

Lozano: No, sir.

We do not find Lozano contradicted his prior testimony. In his direct appeal, we held that based on Lozano's testimony presented at the breach of contract trial, it could be understood that Lozano stated that he entered into contracts as an individual, not as Sandia Depot. See *Lozano*, 2013 WL 268941 at \*2. However, during the malpractice trial, testimony and evidence clarified that specific issue.<sup>5</sup> Instead of offering

---

<sup>5</sup> Besides his testimony, Lozano offered into evidence the articles of incorporation for Sandia Depot on file with the Texas Secretary of State, Corporations Section, with a file stamp date of December 1, 2000.

contradicting testimony at the malpractice trial, Lozano, through the questions of his counsel, cleared up any misconceptions from the prior trial and explained that his answers during the initial trial were made in reference to his dealings as a corporate representative for Sandia Depot. Lozano explained that he was never asked additional clarifying questions by Alamia during the breach of contract trial when Alamia represented him. We hold the testimony offered by Lozano during the malpractice trial was not contradictory and therefore, would not fall under the requirements of judicial estoppel. *See Andrews*, 959 S.W.2d at 649.

Additionally, a judicial estoppel argument could only succeed in this appeal if Lozano was successful in the first proceeding based on his testimony. *See Bailey-Mason v. Mason*, 334 S.W.3d 39, 43 (Tex. App.—Dallas 2008, no pet.); *see also Ferguson*, 295 S.W.3d at 643. Lozano's testimony in the first trial did not render him successful, as the judgment was entered against him based on Sky Farms' countersuit. For this reason, the allegation of judicial estoppel also fails. *See Bailey-Mason*, 334 S.W.3d at 43.

We overrule Alamia's first issue.

#### **IV. CONCLUSION**

We affirm the trial court's judgment.

GINA M. BENAVIDES,  
Justice

Delivered and filed the  
6th day of April, 2017.