NUMBER 13-16-00465-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE SHAHIN ZARAIENH

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Contreras and Longoria
Memorandum Opinion Per Curiam[1]

By petition for writ of mandamus, relator Shahin Zaraienh contends that the trial court erred by granting a new trial and by ordering a severance of the parties' claims.[2] We conditionally grant the petition for writ of mandamus in part and deny it in part.

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[1] *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case."); *id.* R. 47.4 (distinguishing opinions and memorandum opinions).

[2] This original proceeding arises from trial court cause number C-1384-14-A in the 92nd District Court of Hidalgo County, Texas, and the respondent is the Honorable Luis Singleterry. *See* TEX. R. APP. P. 52.2. This original proceeding joins several other matters arising from the original trial court cause

I. BACKGROUND

On or about February 28, 2014, Dale & Klein, L.L.P. (Dale & Klein) filed suit against its former client Zaraienh seeking to recover its attorney's fees incurred in representing Zaraienh in her divorce from Mohammad Kotaki. Dale & Klein alleged that Zaraienh owed it $218,008.76 for services rendered. It sued Zaraienh for breach of contract, quantum meruit, and suit on a sworn account.

On September 22, 2014, Zaraienh filed a counterclaim against Dale & Klein and third-party claims against Katie Pearson Klein, a member of Dale & Klein, and Fernando Mancias, who also represented Zaraienh in the divorce. Zaraienh alleged that Dale & Klein and Klein had agreed that any attorney's fees that they incurred in excess of the retainer that Zaraienh had paid them would be collected from her ex-husband, and she would not have to pay those fees. Zaraienh contended Dale & Klein and Klein overbilled her and alleged, inter alia, that they negligently handled her divorce proceedings and committed fraud regarding her attorney's fees. She brought causes of action against Dale & Klein and Klein for negligence, fraud, violations of the deceptive trade practices act, breach of fiduciary duty, and breach of contract. Zaraienh's claims against Mancias were based on a flat-fee agreement she had entered with him for the handling of her divorce. Pursuant to the flat-fee agreement, Zaraienh paid Mancias $50,000. Zaraienh asserted that Mancias had agreed that the association of any additional counsel to represent her during the divorce would be at his cost. Mancias suggested that Zaraienh

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number and the severed cause number. *See In re Zaraienh*, No. 13-16-00606-CV, 2018 WL _____, at *_ (Tex. App.—Corpus Christi June 6, 2018, orig. proceeding) (mem. op., per curiam); *Zaraienh v. Mancias, et al.*, No. 13-16-00454-CV, 2018 WL _____, at *_ (Tex. App.—Corpus Christi June 6, 2018, orig. proceeding) (mem. op., per curiam); *Zaraienh v. Dale & Klein L.L.P. et al.*, No. 13-16-00223-CV, 2016 WL 4145967, at *1 (Tex. App.—Corpus Christi Aug. 4, 2016, no pet.) (mem. op., per curiam).

retain Dale & Klein and Klein. Zaraienh sought contribution and reimbursement as to all fees and expenses she paid to Dale & Klein from Mancias. She also brought causes of action against Mancias for negligence and breach of contract.

This lawsuit was tried to a jury in September 2015, and the jury rendered a verdict on October 27, 2015, generally in favor of Zaraienh as will be discussed in more detail herein. During the trial, however, on October 9, 2015, the trial court granted a motion for summary judgment filed by Klein and granted portions of a summary judgment filed by Dale & Klein. The order granting these summary judgments reads as follows:

> On August 31, 2015, came on for hearing [Dale & Klein and Klein's] Traditional and No-Evidence Motion for Summary Judgment on [Zaraienh's] Counterclaims and Third-Party Action and [Dale & Klein and Klein's] Objections to [Zaraienh's] Summary Judgment Evidence. The Court, having considered the foregoing Motion and Objections, is of the opinion that the Motion should be GRANTED IN PART and DENIED IN PART and the Objections should be SUSTAINED.
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> IT IS ORDERED that [Dale & Klein and Klein's] Traditional and No-Evidence Motion for Summary Judgment on [Zaraienh's] Counterclaims and Third Party-Action be and is hereby GRANTED for the Counterclaims and Third-Party Action which follow:
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> 1) negligence by [Dale & Klein and Klein];
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> 2) fraud by [Dale & Klein and Klein];
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> 3) violation of the Texas Deceptive Trade Practices Act by [Dale & Klein and Klein]; and
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> 4) breach of fiduciary duty by [Dale & Klein and Klein].
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> IT IS FURTHER ORDERED that [Dale & Klein and Klein's] Traditional and No-Evidence Motion for Summary Judgment on [Zaraienh's] Counterclaims and Third Party-Action be and is hereby GRANTED on all claims asserted against [Klein] by [Zaraienh].
>
> IT IS FURTHER ORDERED that [Dale & Klein and Klein's] Traditional and No-Evidence Motion for Summary Judgment on [Zaraienh's]

> Counterclaims and Third-Party Action be and is hereby DENIED for the Counterclaims and Third-Party Action which follow:
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> 1) breach of contract by [Dale & Klein].
>
> IT IS FURTHER ORDERED that [Dale & Klein and Klein's] Objections to [Zaraienh's] Summary Judgment Evidence be and are hereby SUSTAINED.

During trial, the judge orally granted a directed verdict against Zaraienh on all of her claims against Mancias. After deliberations, the jury reached a non-unanimous verdict in favor of Zaraienh on October 27, 2015. The jury concluded, inter alia, that Dale & Klein's representation of Zaraienh began with an oral agreement; that the terms of the written agreement between Zaraienh and Dale & Klein were not fair and equitable to Zaraienh; and that Zaraienh failed to comply with the written agreement but her failure was excused because she entered the written agreement as a result of fraud committed by Dale & Klein. The jury awarded Dale & Klein nothing on its claim for attorney's fees. The jury found that Dale & Klein failed to comply with its written agreement for representation and awarded Zaraienh $218,008.76 for "charged fees that [were] not reasonable and necessary."

After post-trial proceedings, the trial court entered a final judgment on March 16, 2016. The final judgment incorporated the directed verdict that the trial court had orally rendered in favor of Mancias. The judgment also denied Dale & Klein's motions for judgment notwithstanding the verdict and to disregard some of the jury's answers. The judgment provided that Zaraienh recover from Dale & Klein "on the oral agreement for representation in all matters relating to a suit for divorce" the sum of $24,000.00 plus prejudgment interest of $1,345.61, for a total sum of $25,345.61 through November 5, 2015, "with a per diem of $3.29 until entry of the Final Judgment." The judgment further

awarded post-judgment interest in favor of Zaraienh. It ordered the costs of court incurred by Mancias to be paid by Zaraienh and ordered that all costs of court incurred by Dale & Klein and Zaraienh "are adjudged against the party incurring same." The judgment does not expressly reference the previous summary judgment rendered in favor of Dale & Klein and Klein.

Zaraienh filed a notice of appeal of the final judgment in our cause number 13-16-00223-CV; however, the trial court subsequently granted a motion for new trial. *See Zaraienh v. Dale & Klein L.L.P. et al.*, No. 13-16-00223-CV, 2016 WL 4145967, at *1 (Tex. App.—Corpus Christi Aug. 4, 2016, no pet.) (mem. op. per curiam). The order specifically grants a new trial on Dale & Klein's claims for breach of contract, suit on sworn account, and quantum meruit, and on Zaraienh's breach of contract claim.

Subsequently, on June 7, 2016, Mancias filed a motion for severance. Mancias's motion for severance stated in relevant part:

> MANCIAS seeks severance of: 1) ZARAIENH's claims against MANCIAS resolved by this Court's granting of a Motion for Directed Verdict in favor of MANCIAS; and 2) ZARAIENH's claims against DALE & KLEIN, L.L.P. and KLEIN resolved by the Court's October 9, 2015 Order.
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> This controversy involves more than one cause of action and the claims sought to be severed could be tried independently. The severed claims are not so interwoven with the remaining claims that they involve the same facts and circumstances. The requested severed claims against MANCIAS were resolved by the Court 7 months ago and were not impacted by the Court's granting of a New Trial. The requested severed claims against DALE & KLEIN, L.L.P. and KLEIN were resolved by the Court almost 8 months ago and likewise were not impacted by the Court's granting of a New Trial. However, DALE & KLEIN, L.L.P.'s claims for breach of contract, suit on sworn account, and quantum meruit and ZARAIENH's claim of breach of written contract DALE & KLEIN, L.L.P. have not yet been resolved as result of the Court's granting of a New Trial on such claims.
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> Therefore, the granting of this Motion for Severance will do justice, avoid prejudice, and further the convenience of the parties and the Court.

On July 12, 2016, the trial court entered an order granting Mancias's motion for severance. The order provided:

> On this day, came on to be heard [Mancias's] Motion for Severance. After considering the Motion, the Court is of the opinion that said Motion is well taken, and it is therefore,
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> ORDERED that [Mancias's] Motion for Severance be, and is hereby GRANTED.
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> IT IS FURTHER ORDERED that [Zaraienh's] Third-Party Action against [Mancias and Klein] along with [Zaraienh's] Third Amended Counterclaim for breach of fiduciary duty, fraud, negligence, and DTPA against [Dale & Klein] be and are hereby severed from all other claims of the parties and the Clerk of this Court shall docket the cause of action which shall be styled, "*Shahin Zaraienh v. Fernando Mancias, Katie Klein, and Dale & Klein, L.L.P.*" as a separate cause of action in the 92nd Judicial District Court of Hidalgo County, Texas bearing Cause No. C-1384-14-A(1).

On August 8, 2016, Klein filed a motion to enter judgment in the severed case. Her motion to enter judgment recited the procedural history of the case and asked the court to enter a proposed judgment which was attached to the motion. The motion does not include any argument or authority and does not facially appear to request any additional relief.

The trial court entered a final judgment in the severed suit on September 27, 2016. The final judgment in the severed suit incorporated the summary judgment ruling and the directed verdict in favor of Mancias. The final judgment's provisions differ slightly from those incorporated in the trial court's previous rulings. The final judgment in the severed cause provided that Zaraienh take nothing from Klein and Mancias and dismissed her causes of action against them with prejudice. It ordered her to take nothing on her claims of negligence, fraud, breach of fiduciary duty, and deceptive trade practices against Dale

& Klein and dismissed those causes with prejudice. It ordered all costs of court spent or incurred to be assessed against Zaraienh.

This original proceeding ensued. Zaraienh raises four issues contending that: (1) the order granting a new trial is void because it was signed by the trial court judge while he was outside of the county seat; (2) the trial court's new trial order is insufficient because it parroted a pro forma template; (3) the trial court's new trial order does not state a clear, legally appropriate, and reasonably specific reason for granting a new trial, and the court's articulated reasons are not supported by the record; and (4) the trial court improperly severed its rulings and orders, thereby inappropriately splitting causes of action.

This Court requested a response to the petition for writ of mandamus from the real party in interest Dale & Klein, or any others whose interest would be directly affected by the relief sought. *See* TEX. R. APP. P. 52.2, 52.4, 52.8. Dale & Klein filed a response to the petition for writ of mandamus and an unopposed second motion for extension of time to file the response. We grant Dale & Klein's motion and consider its response to the petition for writ of mandamus as timely filed. Dale & Klein further filed a motion to strike a portion of Zaraienh's mandamus record. Because we did not consider that portion of the record in disposing of this matter, we dismiss this motion as moot.

II. STANDARD OF REVIEW

Mandamus is an extraordinary remedy. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding).

The relator bears the burden of proving both requirements. *In re H.E.B. Grocery Co.*, 492 S.W.3d at 302; *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). An abuse of discretion occurs when a trial court's ruling is arbitrary and unreasonable or is made without regard for guiding legal principles or supporting evidence. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. *In re Essex Ins. Co*., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

In appropriate circumstances, the issues raised in this original proceeding are subject to review by mandamus. *See*, *e.g.*, *In re Bent*, 487 S.W.3d 170, 173 (Tex. 2016) (orig. proceeding) (stating that a trial court's order granting a new trial is subject to mandamus review); *In re Sw. Bell Tel. Co*., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (stating that mandamus relief is proper when the trial court issues a void order, and, in that circumstance, the relator need not demonstrate the lack of an adequate remedy by appeal); *In re State*, 355 S.W.3d 611, 615 (Tex. 2011) (orig. proceeding) (granting mandamus relief regarding a severance order).

III. ANALYSIS

We have carefully considered the issues raised by Zaraienh in this original proceeding. We determine that Zaraienh's first three issues pertaining to the order granting a new trial lack merit, and we address them only briefly here. *See* TEX. R. APP.

P. 47.4, 52.8(d). However, as we will further explain, the trial court abused its discretion by granting the motion for severance filed by Mancias.

A. Jurisdiction to Sign the New Trial Order

In her first issue, Zaraienh argues that the trial court's order granting the new trial is void because it was signed outside of the State of Texas. Zaraienh supports this argument with an affidavit stating that "[b]ased on what I was told by the Court staff, I determined that Judge Luis Singleterry was not physically present in Hidalgo County, Texas, during the week of May 30, 2016, and that he was out of the State of Texas that entire week." Here, the order granting the new trial was signed on May 31, 2016. For the purposes of our analysis, we assume, without deciding, that Zaraeihn has established that the trial judge was not in the county seat when the judge signed the new trial order.

Under article V, section 7 of the Texas Constitution, a district court "shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law." TEX. CONST. art. V, § 7; *see also* TEX. GOV'T CODE ANN. § 74.094(e) ("A judge who has jurisdiction over a suit pending in one county may, unless objected to by any party, conduct any of the judicial proceedings except the trial on the merits in a different county."). The constitutional "county seat" requirement has been held to be jurisdictional, so that if a district court sits outside its jurisdictional geographic area, its proceedings are fundamentally defective and any order based on those proceedings is void. *Acevedo v. Comm'n For Lawyer Discipline*, 131 S.W.3d 99, 102–03 (Tex. App.—San Antonio 2004, pet. denied). The term "proceeding," as used in article V, section 7, is very broad. *Mellon Serv. Co. v. Touche Ross & Co.*, 946 S.W.2d 862, 868 (Tex. App.—Houston [14th Dist.] 1997, no writ). However, neither the mental

processes of a judge nor the task of signing orders on motions is a proceeding that must occur from the county seat. *See Fox v. Alberto*, 455 S.W.3d 659, 663–64 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Whatley v. Walker*, 302 S.W.3d 314, 325 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Burns v. Bishop*, 48 S.W.3d 459, 465 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The trial judge's actions in considering and signing the order granting a new trial did not constitute a proceeding under article V, section 7 of the Texas Constitution that needed to be carried out from the county seat. *See Fox*, 455 S.W.3d at 64; *Whatley*, 302 S.W.3d at 325. Therefore, the trial court's alleged acts of contemplating the motion and signing the order outside of Hidalgo County do not make the new trial order void. We conclude that Zaraienh's argument is without merit.

B. Sufficiency of New Trial Order

In her second and third issues, Zaraienh contends that the trial court's new trial order is insufficient because it parroted a pro forma template and the trial court's new trial order does not state a clear, legally appropriate, and reasonably specific reason for granting a new trial, and the court's articulated reasons are not supported by the record.

Rule 320 of the Texas Rules of Civil Procedure gives the trial court broad discretion to grant a new trial "for good cause, on motion or on the court's own motion." TEX. R. CIV. P. 320. However, because the Texas Constitution guarantees the right to trial by jury, that authority is not unfettered. *See* TEX. CONST. art. I, § 15; *In re Bent*, 487 S.W.3d 170, 175 (Tex. 2016) (orig. proceeding). Although trial courts have significant discretion in granting new trials, "such discretion should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis." *In re Columbia*

Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 212 (Tex. 2009) (orig. proceeding); *see In re United Scaffolding, Inc*., 377 S.W.3d 685, 688–89 (Tex. 2012) (orig. proceeding). Thus, a trial court's order granting a motion for new trial must provide a reasonably specific explanation of the court's reasons for setting aside a jury verdict. *In re Bent*, 487 S.W.3d at 173; *In re Columbia Med. Ctr.*, 290 S.W.3d at 213.

A trial court does not abuse its discretion so long as its stated reason for granting a new trial is: (1) a reason for which a new trial is legally appropriate, such as a well-defined legal standard or a defect that probably resulted in an improper verdict; and (2) specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand. *In re United Scaffolding, Inc*., 377 S.W.3d at 688–89. A new trial order may be an abuse of discretion if, for example, it is based on a reason that is not legally valid, or "if the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's." *Id.* at 689. Further, an appellate court may conduct a merits-based mandamus review of a trial court's articulated reasons for granting a new trial. *In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d 746, 758 (Tex. 2013) (orig. proceeding); *see In re Whataburger Rests. L.P.*, 429 S.W.3d 597, 598 (Tex. 2014) (orig. proceeding) (per curiam). If the articulated reasons are not supported by the law and the record, mandamus relief is appropriate. *In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d at 761–62.

In this case, the order granting a new trial is detailed and lengthy and specifies, inter alia, that certain jury findings are not supported by factually sufficient evidence, "highly prejudicial and inflammatory testimony" from specified witnesses caused

prejudice, an alternate juror's participation during jury deliberations constituted "outside influence," there was error made in jury selection insofar as the jury foreman failed to disclose his personal relationships with the attorneys in this case, and certain evidentiary matters caused reversible error. The new trial order goes into specific detail regarding the facts underlying these findings. We conclude that the stated reasons for granting a new trial were reasons for which a new trial is legally appropriate and the reasons are specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived its articulated reasons from the particular facts and circumstances of the case at hand. *See In re United Scaffolding, Inc*., 377 S.W.3d at 688–89.

Zaraienh further argues that the trial court's articulated reasons for granting a new trial are not supported by the law and the record. *See In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d at 761–62. However, based on the record before us in this original proceeding, Zaraienh has not met her burden to show that the trial court abused its discretion in granting the new trial. *See Walker*, 827 S.W.2d at 839–40.

C. Severance

In her fourth issue, which we consider to be the seminal issue of this case, Zaraienh contends that the trial court improperly severed its rulings and orders, thereby inappropriately splitting causes of action. We agree and conclude that the trial court erred by granting severance.

"Any claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41; *see State v. Morello*, No.16-0457, 2018 WL 1025685, at *6, __ S.W.3d __, __ (Tex. Feb. 23, 2018). Trial courts have broad discretion to sever claims, and a severance is improper only if the trial court abused its discretion in ordering the

severance. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007); *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990). The predominant reasons for a severance are to do justice, avoid prejudice, and promote convenience. *F.F.P. Operating Partners, L.P.*, 237 S.W.3d at 693; *In re Progressive Cty. Mut. Ins. Co.*, 439 S.W.3d 422, 425 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). A trial court does not abuse its discretion in severing a claim for purposes of enabling the parties to expedite appellate review of a partial summary judgment. *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525–26 (Tex. 1982); *Dorsey v. Raval*, 480 S.W.3d 10, 15 (Tex. App.—Corpus Christi 2015, no pet.). More specifically, "[a]lthough a severance is sometimes ordered merely to expedite appellate review of a partial summary judgment, that reason alone is not grounds to find an abuse of discretion if the claim is properly severable." *Saxer v. Nash Phillips-Copus Co. Real Estate*, 678 S.W.2d 736, 739 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *see also Ozcelebi v. Chowdary*, No. 13-13-00659-CV, 2015 WL 6119495, at *2 (Tex. App.—Corpus Christi Oct. 15, 2015, no pet.) (mem. op.).

Severance is proper when (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of an independently asserted lawsuit, and (3) the severed claim is not so interwoven with the remaining action that the actions involve the same facts and issues. *See Morello*, 2018 WL 1025685, at *6; *In re State*, 355 S.W.3d 611, 614 (Tex. 2011) (orig. proceeding); *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658. If any one of these three criteria are not met, then the trial court has abused its discretion and reversal is warranted. *Yeske v. Piazza Del Arte, Inc.*, 513 S.W.3d 652, 677 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Here, Dale &

Klein sued Zaraienh to recover its attorney's fees, and Zaraienh sued Dale & Klein, Klein, and Mancias for, inter alia, professional negligence and malpractice. All of these claims arise from the attorney-client relationship regarding Zaraienh's divorce proceedings. The trial court's severance order severed all of Zaraienh's claims against Mancias and Klein, and her claims for breach of fiduciary duty, fraud, negligence, and deceptive trade practices against Dale & Klein, from all other claims and causes of action. This appears to leave only the breach of contract claim against Dale & Klein for its attorney's fees remaining in the original cause.

We conclude that the severed claims involve the same facts and issues and are inextricably interwoven with the original action. *See Morello*, 2018 WL 1025685, at *6. The alleged malpractice of Dale & Klein, Klein, and Mancias, whether stated as a cause of action in negligence or breach of fiduciary duty, will be central to Zaraienh's affirmative malpractice claims and her defenses to Dale & Klein's claim for attorney's fees. *See Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996) ("[A] legal malpractice action sounds in tort and is governed by negligence principles."); *In re Tex. Collegiate Baseball League, Ltd*., 367 S.W.3d 462, 466–67 (Tex. App.—Fort Worth 2012, orig. proceeding) ("Severance or separate trials are . . . not appropriate because the fee claim and the malpractice claims involve the same facts and issues."); *NationsBank of Tex., N.A. v. Akin, Gump, Hauer & Feld, L.L.P*., 979 S.W.2d 385, 397–98 (Tex. App.—Corpus Christi 1998, pet. denied) (holding that because the malpractice claim must be remanded, the law firm's claim for its attorney's fees must also be remanded because the entitlement to fees was "wholly dependent" on the outcome of malpractice claims); *see also Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (holding that a client need not prove actual

damage before obtaining forfeiture of attorney's fees for the breach of the attorney's fiduciary duty to the client); *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("Recovery of fees paid to an attorney may be appropriate when [the attorney's] negligence rendered the services of no value."); *Morales v. Cline*, 202 S.W. 754, 757 (Tex. Civ. App.—San Antonio 1918, writ dism'd w.o.j.) (noting that attorney's negligence may preclude the recovery of compensation for the attorney's services). Severance in this case was therefore not appropriate because Dale & Klein's claim for attorney's fees and Zaraienh's malpractice claims against Dale & Klein, Klein, and Mancias involve the same facts and issues. *See Morello*, 2018 WL 1025685, at *6; *In re State*, 355 S.W.3d at 614; *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658. Accordingly, the trial court abused its discretion in severing these causes.

We further note that the trial court issued its severance order on July 12, 2016, after this lawsuit had been submitted to the jury on October 27, 2015, after the trial court entered a final judgment on March 16, 2016, and after the trial court granted the motion for new trial. The trial court cannot sever a case after the case has been submitted to the trier of fact. *See* TEX. R. CIV. P. 41; *State Dep't of Highways & Pub. Transp. v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993) (per curiam); *see also Long v. Castle Tex. Prod. Ltd. P'ship*, 426 S.W.3d 73, 82 (Tex. 2014); *Christopher Columbus St. Mkt. L.L.C. v. Zoning Bd. of Adjustments of City of Galveston*, 302 S.W.3d 408, 414 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Lousteau v. Noriega*, No. 01-15-00254-CV, 2016 WL 4537371, at *5–6 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, pet. denied) (mem. op.); *Arlitt v. Weston*, No. 04-98-00035-CV, 1999 WL 1097101, at *4 (Tex. App.–San Antonio Dec. 1, 1999, pet. denied) (mem. op.).

As a final matter, we note that the trial court may grant a new trial on part of the matters in a case only if "such part is clearly separable without unfairness to the parties." TEX. R. CIV. P. 320. A partial new trial may be ordered notwithstanding the prohibition in Rule 41 against post-submission severances. *Cotner*, 845 S.W.2d at 819; *see* TEX. R. CIV. P. 41. Rule 320 is thus an exception to Rule 41. *See id*. However, as stated above, the claims in this suit are not separable without unfairness to the parties. Therefore, the trial court erred by granting a new trial as to only part of the matters in this case.

IV. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, the record, and the applicable law, is of the opinion that Zaraienh has met her burden to obtain mandamus relief, in part, with regard to the trial court's severance order. Accordingly, we lift the stay previously imposed in this case. *See* TEX. R. APP. P. 52.10(b) ("Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided."). We conditionally grant mandamus relief and direct the trial court to withdraw its order of severance and vacate all orders and judgments entered in the severed cause of action. We are confident that the trial court will promptly comply and our writ will issue only if it does not. We deny all other relief requested.

PER CURIAM

Delivered and filed the
6th day of June, 2018.