

**NO. 12-11-00290-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*HAROLD JOEL GARDNER,  
APPELLANT*

§

*APPEAL FROM THE 321ST*

*V.*

§

*JUDICIAL DISTRICT COURT*

*SHIRLEY LEGRAND,  
APPELLEE*

§

*SMITH COUNTY, TEXAS*

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***MEMORANDUM OPINION***

Harold Joel Gardner has appealed from the denial of his bill of review seeking to set aside a judgment based on a settlement agreement between him and Shirley LeGrand. In two issues, Gardner contends the trial court erred in denying his bill of review. We affirm.

**BACKGROUND**

Gardner filed a petition seeking a divorce from LeGrand. On the day of the scheduled bench trial, Gardner's counsel announced to the court that the parties had reached an agreement. Gardner's counsel told the court that Gardner agreed there was no marriage between the parties in exchange for payment of \$5,000.00 from LeGrand. The trial court entered judgment based upon the announced agreement.

Gardner was not present in the courtroom when his counsel announced the settlement to the court. Rather, he was sitting outside the courtroom. Gardner's counsel later filed a motion for new trial, which was overruled by operation of law. Gardner also untimely filed an appeal in this court that was dismissed for lack of jurisdiction. Gardner then filed a petition for a bill of review with the 321st District Court of Smith County, which was the court that signed the judgment based upon the settlement agreement.

Following a hearing, the trial court denied Gardner's bill of review. This appeal followed.

### **BILL OF REVIEW**

In his first issue, Gardner contends the trial court erred in denying his bill of review.

#### **Standard of Review**

As a general matter, we review a trial court's ruling on a bill of review under an abuse of discretion standard. *Ramsey v. State*, 249 S.W.3d 568, 574 (Tex. App.—Waco 2008, no pet.). However, the determination whether a bill of review plaintiff has made a prima facie showing of a meritorious claim or defense (or of a meritorious ground for appeal) is a question of law. *Id.* (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979)). Questions of law are reviewed de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

#### **Applicable Law**

A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam). A bill of review plaintiff must ordinarily prove (1) a meritorious claim or defense with regard to the underlying cause of action; (2) which the bill of review plaintiff was prevented from making by the fraud, accident, or wrongful act of the opposing party, or by official mistake; and (3) unmixed with any fault or negligence on the bill of review plaintiff's own part. *Id.* Each of these elements must be pleaded and proven. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003).

Only extrinsic fraud will support the fraud element required for a bill of review to be successful. *See Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989). Extrinsic fraud is wrongful conduct practiced outside of the adversary trial that affects the manner in which the judgment was procured and prevents a litigant from having a fair opportunity to assert his rights at trial. *See Browning v. Prostock*, 165 S.W.3d 336, 347 (Tex. 2005); *Tice*, 767 S.W.2d at 702; *Nelson v. Chaney*, 193 S.W.3d 161, 165 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Conversely, intrinsic fraud relates to matters that could have been litigated in the initial action, including fraudulent instruments and perjured testimony. *See Browning*, 165 S.W.3d at 347-48. Allegations of fraud or negligence on the part of a party's attorney are insufficient to support a

bill of review. *King Ranch, Inc.*, 118 S.W.3d at 752 (citing *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987)). A bill of review plaintiff who alleges that the wrongful act of his attorney caused an adverse judgment is not excused from the necessity of pleading and proving his opponent's extrinsic fraud. *Id.*

### **Discussion**

In his first issue, Gardner contends the trial court erred in denying his petition for bill of review. In his petition, Gardner alleged that his attorney entered into an agreement without his consent. He made no allegations in his bill of review that LeGrand had committed any fraud against him in reaching the settlement agreement that led to the judgment of which he now complains. Without pleading any facts alleging that LeGrand committed extrinsic fraud, Gardner was unable to successfully prosecute his bill of review. *See id.*

Moreover, at the hearing on Gardner's petition for bill of review, in regard to the fraud element, Gardner attempted to prove only that his trial counsel entered into a settlement agreement that led to the judgment without his consent. He presented some evidence of this allegation. However, as we have stated, allegations of fraud or negligence on the part of a party's attorney are insufficient to support a bill of review. *Id.* We hold that because Gardner failed to both plead and prove the required extrinsic fraud element against LeGrand, and because the only evidence he offered is insufficient to support the relief he requested, the trial court properly denied his petition for bill of review.

Gardner's first issue is overruled.

### **JURISDICTION OF THE 321ST JUDICIAL DISTRICT COURT**

In his second issue, Gardner contends that the 321st Judicial District Court did not have jurisdiction to deny his bill of review. We disagree.

Only the court rendering the original judgment has jurisdiction over the proceeding, and the bill of review must be filed in the same court that rendered the judgment under attack. *Rodriguez ex rel. Rodriguez v. EMC Mortg.*, 94 S.W.3d 795, 797 (Tex. App.—San Antonio 2002, no pet.). In the instant case, the judgment Gardner complains of in his petition for bill of review was rendered by the 321st Judicial District Court of Smith County. He filed his bill of review in the same court. A court that has jurisdiction of a bill of review has the power to deny it.

Gardner's second issue is overruled.

**DISPOSITION**

Having overruled Gardner's two issues, we *affirm* the judgment of the trial court.

**JAMES T. WORTHEN**  
Chief Justice

Opinion delivered July 11, 2012.

*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(PUBLISH)



**COURT OF APPEALS  
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS  
JUDGMENT**

**JULY 11, 2012**

**NO. 12-11-00290-CV**

**HAROLD JOEL GARDNER,**

Appellant

V.

**SHIRLEY LEGRAND,**

Appellee

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Appeal from the 321st Judicial District Court  
of Smith County, Texas. (Tr.Ct.No. 10,2749-D)

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THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellant, **HAROLD JOEL GARDNER**, for which execution may issue, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*