

AFFIRMED; Opinion Filed May 10, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00130-CV

**SUSAN ASHTON, Appellant
V.
KOONSFULLER, P.C., Appellee**

**On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-05346**

MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Stoddart
Opinion by Justice Stoddart

Susan Ashton appeals the trial court's partial no-evidence summary judgment granted in favor of KoonsFuller, P.C. In two issues, Ashton argues the trial court erred by granting summary judgment on her claims for breach of fiduciary duty and fraud. We affirm the trial court's judgment.

FACTUAL BACKGROUND

KoonsFuller represented Ashton during her divorce from Ivan Ashton, but withdrew from the representation before the divorce was finalized. After a Final Decree of Divorce was entered, Ashton sued KoonsFuller for negligence, breach of fiduciary duty, and fraud, asserting the firm entered into a Rule 11 agreement without her permission, the firm did not properly account for the community estate and the community estate was not equitably divided as a result of

KoonsFuller's alleged misconduct, the firm failed to protect her from liquidation of a retirement account to pay attorney's fees, the firm overbilled her for the services it provided, and she was improperly advised that she must sell her home to pay attorney's fees.

KoonsFuller filed a no-evidence motion for summary judgment on all of Ashton's claims. Ashton responded and filed her own affidavit, the affidavit of her expert witness, billing statements, and deposition excerpts. KoonsFuller objected and moved to strike much of Ashton's summary judgment evidence. The trial court denied the evidentiary objections and granted the no-evidence motion for summary judgment as to the breach of fiduciary duty and fraud claims, but denied the motion on Ashton's negligence claim. Ashton subsequently nonsuited her negligence claim. This appeal followed.

LAW & ANALYSIS

We review the trial court's summary judgment de novo. *First United Pentecostal Church v. Parker*, No. 15-0708, 2017 WL 1032754, at *3 (Tex. Mar. 17, 2017). When we review a no-evidence summary judgment, we inquire whether the nonmovant produced evidence raising a genuine issue of material fact as to the challenged elements. *Id.* We review the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

Ashton raises two issues on appeal: the trial court erred by granting KoonsFuller's motion for summary judgment on her breach of fiduciary duty claim and on her fraud claim. KoonsFuller's primary argument in response is the trial court's judgment should be affirmed based on the anti-fracturing rule which prevents a plaintiff from recasting professional negligence claims as fraud and breach of fiduciary duty claims. *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.) (citing *Won Pak v. Harris*, 313 S.W.3d 454, 457 (Tex. App.—Dallas 2010, pet. denied)). However, KoonsFuller failed to raise this argument in its motion for summary judgment and a trial court cannot grant a summary judgment motion on a ground not presented in the motion. *See Gish*, 286 S.W.3d at 310. KoonsFuller first asserted this argument in its reply to Ashton’s response to its motion for summary judgment. However, without obtaining Ashton’s consent, KoonsFuller was not entitled to raise a new ground for summary judgment in its reply to her response. *See Shuma v. Power*, No. 05-14-00623-CV, 2015 WL 4141693, at *3 (Tex. App.—Dallas July 9, 2015, no pet.) (mem. op.). Therefore, we do not consider this argument on appeal.

A. Evidentiary Considerations

Before addressing whether Ashton met her burden to provide more than a scintilla of probative evidence on each element of her claims, we consider the evidence Ashton submitted to the trial court. Ashton heavily relies on the affidavit and deposition testimony of her expert witness, Frank Hill, to meet her summary judgment burden. KoonsFuller objected to most of the testimony as conclusory.

The Texas Rules of Civil Procedure require that affidavits submitted as summary judgment evidence set forth facts that would be admissible in evidence. *Rabe v. Dillard’s Inc.*, 214 S.W.3d 767, 769 (Tex. App.—Dallas 2007, no pet.) (citing TEX. R. CIV. P. 166a(f)). Deposition transcripts may also be submitted as summary judgment evidence. *See generally* TEX. R. CIV. P. 166a(d). However, conclusory testimony from an expert witness is insufficient to raise a question of fact to defeat summary judgment. *Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013) (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 749–50 (Tex. 2003)); *see also IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 803 (Tex. 2004) (expert’s conclusory statements are insufficient to raise a fact question to defeat summary judgment). “Expert

opinions must be supported by facts in evidence, not conjecture.” *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (per curiam). Expert testimony will support or defeat summary judgment only if it is “[c]lear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.” *See Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997) (citing TEX. R. CIV. P. 166a(c)).

1. *Frank Hill Affidavit*

In his affidavit, Hill states KoonsFuller overbilled Ashton for its services, failed to adequately account for the marital estate, gave Ashton incorrect legal advice, breached its fiduciary duty to Ashton, and engaged in fraud.¹ After reviewing Hill’s affidavit, the bulk of

¹ The affidavit from Frank Hill states:

It is my opinion that KoonsFuller engaged in unfair and excessive billing practices and that its bills to Susan Ashton for which it was paid were excessive. It is further my opinion that KoonsFuller engaged in fraud and misrepresentation to its client Susan Ashton in its billing practices.

....
The fees charged for the type of legal services provided by KoonsFuller in this case are usually less than the fees charged by KoonsFuller, given the services provided by them to Ms. Ashton as discussed further below.

....
There should have been a large amount of money and property involved in the divorce case. KoonsFuller never identified what that amount was. The results obtained for Ms. Ashton by KoonsFuller were very poor, as explained below.

....
KoonsFuller charged Susan Ashton more than \$800,000. In the process of rolling up fees of that magnitude, [the] law firm took one deposition – the deposition of Ivan Ashton’s brother, with issues regarding the IA Trust. Ivan Ashton, the husband, and the person who should have had the most knowledge of the assets, his business affairs, the values of the various businesses which he owned and the source of his funds, was not deposed by KoonsFuller at all. KoonsFuller’s bills repeatedly show multiple lawyers and legal assistants all doing much the same thing. As an example, over 200 hours were billed by 4 KoonsFuller lawyers and one legal assistant in preparation for or attending mediation. Over 100 hours were billed just by KoonsFuller lawyers on discovery issues. Simply as a matter of reasonableness, these hours are excessive to the point of being ridiculous. The case did not settle at mediation. Proper and complete discovery responses were not obtained, as evidenced by KoonsFuller’s inability to value the community and separate property assets by the time it withdrew, in spite of representing Ms. Ashton for more than 3 years.

There is no reason in this case that 3 lawyers would need to attend mediations, nor that anything close to the time billed would be required to prepare for mediation. . . . Without adequate discovery, the time spent to prepare for mediation becomes even more excessive. The lawyers [at] KoonsFuller failed to ever get enough information to even evaluate the size of the marital estate, or distinguish between community and separate property in a meaningful way.

The condition of Susan Ashton’s case when KoonsFuller withdrew was not much better, if any better, than it was on the day that KoonsFuller took the case over. As stated previously, no depositions of consequence were taken by KoonsFuller. KoonsFuller could not identify and value the assets of the marriage. The case had not been resolved. KoonsFuller, however, had somehow accumulated over \$800,000.00 in fees, and the benefit to Susan Ashton from those fees was, in my opinion, not at all comparable to the amount that was billed. KoonsFuller’s business model obviously required several billing legal professionals – lawyers and legal assistants – to work on matters somewhat simultaneously and bill some hours to the Ashton file virtually every week. Progress in the case or benefit to the client dose [sic] not appear to have been a major consideration in the firm’s billings.

Every time KoonsFuller sent Susan Ashton a bill for 3 lawyers attending a mediation or multiple lawyers preparing for a mediation, or legal assistants preparing for or attending a mediation, KoonsFuller was representing to its client Susan Ashton that these services were necessary for the good of the client and the advancement and protection of her interests, and that the amounts being charged were reasonable. They were not, and KoonsFuller made representations to the client with each bill that its fees were reasonable and necessary, expected the client to accept and rely on KoonsFuller

which is quoted in footnote 1, we conclude it is conclusory and is not adequate summary-judgment evidence.

Hill makes statements and draws conclusions about KoonsFuller's actions, but fails to provide the facts underlying his conclusions. *See Earl v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999) (affiant must "explain the basis of his statements to link his conclusions to the facts."); *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied). For example, Hill avers that KoonsFuller's billing practices were unfair and excessive, but the affidavit does not explain why. The affidavit does not state that KoonsFuller's billing rates were either unreasonable or not what the client and law firm agreed to. Likewise, while Hill disagrees with the amount of time KoonsFuller spent on discovery matters and preparing for mediation, the affidavit does not state how much time would have been reasonable. Similarly, Hill complains about the number of lawyers and legal assistants billing for these services, but does not suggest what an appropriate number would be. Further, while Hill's testimony is that KoonsFuller

[sic] representation and knew or should have known that the fees were not reasonable. KoonsFuller's nondisclosure also defrauded Susan Ashton. The lawyers failed to disclose their own negligence and breach of duty when they had a duty to do so intending that their fees would be paid, and harmed Susan Ashton thereby. Likewise, KoonsFuller committed constructive fraud by its duties to its client as set forth herein, which the law declares fraudulent because of its tendency to deceive others, violate confidence, or injure the public interests. In my opinion, KoonsFuller did so by abusing its fiduciary position and profiting from it, through these misrepresentations and excessive fees, as explained in this Affidavit.

...
... In my opinion, the Defendant lawyers breached their fiduciary duty to Susan Ashton in at least the following respects:

A. The failure to obtain Susan Ashton's approval to the Rule 11 Agreement regarding the Charles Schwab accounts discussed above breached the fiduciary duties of the KoonsFuller attorneys. The attorneys sought her approval, but when it was not obtained, they agreed to the Order without her permission. A lawyer owes his client full and complete honesty, loyalty and disclosure, and must abide by the client's decisions regarding the representation, within app [sic] ethical limits. The lawyers originally sought Susan Ashton's approval for the entry of the Rule 11 order on the Charles Schwab accounts, but when it was not forthcoming, they went ahead without their clients [sic] permission and entered into the Rule 11 Agreement. That breached the fiduciary duty to their client. It harmed Susan by giving up the right to obtain relevant information.

B. The failure to disclose to Susan Ashton that her marital homestead could not be ordered to be sold by the Court (while indicating to the contrary) also breached the lawyers' fiduciary duty, and his breach is exacerbated by the fact that the lawyers would benefit from the sale of the marital homestead property by getting their fees paid.

The Defendant KoonsFuller obtained an improper benefit in the representation by being paid large amounts of money to which it was not entitled and to which it would not have received [sic] but for its breach of duties to its client as set forth above.

... In my opinion, the wrongful acts and omissions of KoonsFuller, P.C., through its agents and employees, whether under the theory of negligence, breach of fiduciary duty, or fraud or misrepresentation, caused harm to Susan Ashton. She incurred additional attorney's fees and lost property, including money which should have been hers had the KoonsFuller lawyers adequately and competently represented her. She also lost funds which should have been hers by the excessive fees paid to KoonsFuller. KoonsFuller should have foreseen that its fraudulent billing practices, negligence and breach of fiduciary duty would harm Susan Ashton.

should have been able to value the marital estate after representing Ashton for three years, Hill does not does not explain why.

Hill's affidavit also states Ashton's lawyers sought her approval for the Rule 11 agreement and, when it was not obtained, agreed to the order without her permission, which was a breach of their duty. However, there is no evidence in the record that Ashton's lawyers sought her approval, that she did not give it to them, or that they agreed to the order without her permission. Again, Hill's conclusions are based on unsupported factual allegations and are not adequate summary judgment evidence.

2. *Frank Hill Deposition*

Ashton provided numerous pages from Hill's deposition testimony in support of her response to the motion for summary judgment. However, the deposition testimony suffers the same fatal flaws as his affidavit. Hill's deposition testimony includes many statements about KoonsFuller's billing practices that he found objectionable, including: (1) the firm has a practice of billing "multiple people to go to things, mediations, and billing for all of them unnecessarily"; (2) KoonsFuller's failure to inform Ashton "how they were wasting her money in representing to her that they were using hundreds of thousands of dollars in an efficient and professional manner putting her interest above their own. I don't think you can just send a bill in the average of \$20,000 bucks a month and do what they did"; (3) KoonsFuller "went to at least two mediations and billed large sums of money for preparation and for mediations" even though the firm was not ready to settle and did not know the value of the marital estate; and (4) a lawyer's billings implicitly represent to the client that the fees are reasonably necessary, but here they were not. As in the affidavit, Hill's deposition testimony does not explain why he believed KoonsFuller should not bill a client when more than one person attends a mediation; what work was unnecessary and why; what KoonsFuller should have told Ashton, but failed to do so; how the

firm's work "wasted" Ashton's money; how he knew KoonsFuller was not ready to settle when it attended mediation and why the firm should have been prepared to settle; and why the fees were too high for the work that KoonsFuller performed. Hill conceded that charging some fees would have been reasonable, "just out of rationality," but failed to explain why the amounts billed were unreasonable or what would have been a reasonable fee.

After reviewing Hill's affidavit and deposition excerpts, we conclude his statements are conclusory and fail to set forth facts that would be admissible in evidence. They are insufficient to provide more than a scintilla of probative evidence to defeat a no-evidence motion for summary judgment.

A. Breach of Fiduciary Duty

In her first issue, Ashton asserts the trial court erred by granting KoonsFuller's no-evidence motion for summary judgment on her breach of fiduciary duty claim. The elements of a breach-of-fiduciary-duty claim are: (1) a fiduciary relationship existed between the plaintiff and defendant; (2) the defendant breached its fiduciary duty to the plaintiff; and (3) the defendant's breach resulted in injury to the plaintiff or benefit to the defendant. *Neese v. Lyon*, 479 S.W.3d 368, 386–87 (Tex. App.—Dallas 2015, no pet.) (citing *Anderton v. Cawley*, 378 S.W.3d 38, 51 (Tex. App.—Dallas 2012, no pet.)); *see also Parker*, 2017 WL 1032754, at *4. In its no-evidence motion, KoonsFuller asserted there is no evidence of each element of Ashton's breach of fiduciary duty claim.

An attorney breaches his fiduciary duty to his client when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interest to his own, retaining the client's funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends. *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.). Texas courts have

generally held that breach of fiduciary duty by a lawyer involves the integrity and fidelity of an attorney and focuses on whether an attorney obtained an improper benefit from representing the client. *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied); *see also Neese*, 479 S.W.3d at 387. The focus is not on “whether an attorney represented a client with the requisite level of skill.” *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App.—Austin 2009, no pet.).

Although KoonsFuller argues there is no evidence to prove it owed a fiduciary duty to Ashton, Ashton’s affidavit states KoonsFuller represented her in the divorce from June 30, 2006 until May 1, 2009. An attorney owes his client a fiduciary duty as a matter of law. *Neese*, 479 S.W.3d at 387. We conclude Ashton’s affidavit is more than a scintilla of evidence that KoonsFuller represented Ashton in the divorce proceeding and a fiduciary relationship existed.

Ashton argues she presented evidence showing KoonsFuller breached its fiduciary duty to her by: (1) withdrawing from representation without protecting her from the loss of her 401(k) account; (2) failing to disclose she did not have to agree to the sale of her homestead to pay attorney’s fees; (3) entering into a Rule 11 agreement without her consent; and (4) billing over \$800,000 in fees and costs without any discernable benefit to her.

Ashton averred she was required to liquidate her 401(k) account to pay attorney’s fees and was charged a tax penalty as a result. Further, KoonsFuller did not take steps to protect her from that liquidation, which occurred shortly after KoonsFuller withdrew from representing her. Ashton does not explain how failing to protect her from the liquidation of her 401(k) account amounted to a breach of fiduciary duty, and we have not found any case stating that a party cannot be required to use funds from a 401(k) account to pay attorney’s fees. Even if we assume Ashton liquidated her 401(k) account and used the proceeds to pay attorney’s fees, Ashton has not shown that KoonsFuller obtained an improper benefit. *See Murphy*, 241 S.W.3d at 693.

KoonsFuller obtaining its fees is not, standing alone, an improper benefit sufficient to constitute a breach of fiduciary duty. *See Won Pak*, 313 S.W.3d at 458 (citing *Beck*, 284 S.W.3d at 433–34; *Murphy*, 241 S.W.3d at 699); *Vara v. Williams*, No. 03–10–00861–CV, 2013 WL 1315035, at *4, n.4 (Tex. App.—Austin Mar. 28, 2013, no pet. h.) (mem. op.) (payment of attorney’s fees does not rise to the level of improper benefit generally necessary to constitute breach of fiduciary duty). Ashton’s complaint that KoonsFuller did not represent her with the requisite level of skill may give rise to a professional negligence claim, but does not constitute a breach of fiduciary duty claim. *See Murphy*, 241 S.W.3d at 693; *Beck*, 284 S.W.3d at 429.

Ashton argues KoonsFuller breached its fiduciary duty by informing her she must sell her homestead to pay its fees. Ashton’s affidavit states a lawyer at KoonsFuller “told me that the marital residence, which was our homestead, would need to be sold in order to pay attorney’s fees. I was never told that a Court in Texas does not have jurisdiction to order the sale of a marital residence which comprises the marital homestead.” There is no evidence in the record that Ashton actually sold the residence or used the proceeds from the sale of her homestead to pay attorney’s fees. Even if we assume KoonsFuller’s advice to Ashton fell below the level of skill that Ashton expected, Ashton has not shown she acted on that advice or it caused harm to her. Finally, Ashton did not show that KoonsFuller received any improper benefit as a result of the advice about which she now complains. As previously stated, KoonsFuller obtaining its fees is not, standing alone, an improper benefit sufficient to constitute a breach of fiduciary duty. *See Won Pak*, 313 S.W.3d at 458.

Ashton complains that KoonsFuller entered into a Rule 11 agreement without her consent. Ashton’s affidavit states that KoonsFuller told her the Rule 11 agreement was a “good idea.” Ashton never asserts KoonsFuller acted against her express wishes by entering into the Rule 11 Agreement. Although Ashton argues she believes she should have signed the agreement

before it was filed with the court, Ashton has not cited any authority requiring a client's signature appear on a Rule 11 agreement. Ashton's evidence does not show KoonsFuller breached its fiduciary duty. Ashton also has not shown KoonsFuller received any improper benefit as a result of entering into the Rule 11 agreement. *See id.*

Ashton argues KoonsFuller favored its pecuniary interest in obtaining its legal fees over her interests by its billing practices and by withdrawing from representing her. Ashton relies on Frank Hill's affidavit to support this allegation. However, we have already concluded Hill's affidavit is not adequate summary judgment evidence.

Having reviewed the evidence in the record, we conclude Ashton did not meet her burden to provide more than a scintilla of probative evidence on each challenged element of her breach of fiduciary duty claim. Therefore, the trial court did not err by granting KoonsFuller's motion for summary judgment on this cause of action. We overrule Ashton's first issue.

B. Fraud

In her second issue, Ashton asserts the trial court erred by granting KoonsFuller's motion for summary judgment on her common law fraud and fraud by non-disclosure claims. The elements of common law fraud are: (1) a material misrepresentation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied). The elements of fraud by nondisclosure, a subcategory of fraud, are: (1) the defendant failed to disclose facts to the plaintiff; (2) the defendant had a duty to disclose those facts; (3) the facts were material; (4) the defendant knew the plaintiff was ignorant of the facts and the plaintiff did not have an equal

opportunity to discover the facts; (5) the defendant was deliberately silent when it had a duty to speak; (6) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting; (7) the plaintiff relied on the defendant's nondisclosure; and (8) the plaintiff was injured as a result of acting without that knowledge. *Id.*

KoonsFuller's no-evidence motion for summary judgment asserted there is no evidence of any of the elements of common law fraud or fraud by nondisclosure. In her response, Ashton argued the "dishonesty in time billed by the attorneys and the lack of benefit to the client from the time the lawyers claim to have spent amount to fraud (actual and constructive) and misrepresentation." She relies on Frank Hill's affidavit and deposition testimony to meet her burden.² However, as previously discussed, the affidavit and deposition testimony of Frank Hill are conclusory and are insufficient to support Ashton's claim that KoonsFuller acted fraudulently. Because Ashton produced no evidence to support her causes of action for fraud, we conclude the trial court did not err by granting KoonsFuller's motion for summary judgment on these causes of action. We overrule Ashton's second issue.

CONCLUSION

We affirm the trial court's judgment in favor of KoonsFuller.

160130F.P05

/Craig Stoddart/

CRAIG STODDART
JUSTICE

² Ashton's response to KoonsFuller's no-evidence motion for summary judgment states that, as to the fraud cause of action, her response "is also supported by portions of the deposition of David Fuller (Exhibit "C") and Julie Crawford (Exhibit "D")," but does not explain which portions of these deposition excerpts are relevant or why she believes they raise a fact issue as to her fraud cause of action. The two exhibits include portions of the deposition transcripts and exhibits to the depositions. Ashton's appellate brief on this issue only directs us to a single page of her original Exhibits C and D, which is a chart labeled "Ashton Entities Contact Information." We have looked at the single document to which a citation was provided in the appellate brief and do not consider it relevant to this issue. Ashton does not explain why the one page is significant or how it shows fraud. As to the other portions of her original Exhibits "C" and "D," we are not required to search through a voluminous record to find support for appellant's propositions. *See Hall v. Douglas*, 380 S.W.3d 860, 868 (Tex. App.-Dallas 2012, no pet.). Further, although Ashton supplemented her response to the no-evidence motion for summary judgment with copies of KoonsFuller's bills to her, she provided no testimony explaining how the billings are fraudulent.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

SUSAN ASHTON, Appellant

No. 05-16-00130-CV V.

KOONSFULLER, P.C., Appellee

On Appeal from the 95th Judicial District
Court, Dallas County, Texas

Trial Court Cause No. DC-12-05346.

Opinion delivered by Justice Stoddart.

Justices Francis and Fillmore participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee KoonsFuller, P.C. recover its costs of this appeal from appellant Susan Ashton.

Judgment entered this 10th day of May, 2017.