2006 WL 3611277
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
San Antonio.

In the Matter of the ESTATE
OF Willard WALLACE.

No. 04-05-00567-CV. | Dec. 13, 2006.

From the County Court, Uvalde County, Texas, Trial Court No. 5964-01; Polly Jackson Spencer, Judge Presiding. [1]

1 Sitting by special assignment pursuant to TEX. GOV'T CODE ANN . § 25.00222 (Vernon 2004).

Attorneys and Law Firms

Jeff Small, Law Office of Jeff Small, Jonathan Yedor, Elms Harmon & Macchia L.L.P., San Antonio, for Appellant.

James L. Drought, Drought, Drought & Bobbitt, L.L.P., San Antonio, for Appellee.

Sitting: CATHERINE STONE, Justice, KAREN ANGELINI, Justice, REBECCA SIMMONS, Justice.

Opinion

MEMORANDUM OPINION

Opinion by KAREN ANGELINI, Justice.

***1** This is a suit for unjust enrichment and for imposition of a constructive trust upon property claimed to be the subject of an oral agreement to make a will. William Riddick asserts that the trial court erred in granting summary judgment dismissing his causes of action. We disagree.

FACTUAL AND PROCEDURAL BACKGROUND

Riddick and the decedent, Willard Wallace, were distant cousins. [2] Wallace owned approximately 500 acres of land in Uvalde County, a large portion of which comprises a park otherwise known as Chalk Park Bluff. Beginning around 1973, Riddick began visiting the park with regularity, during which time, he claims, "a close personal relationship developed between [him] and Wallace." According to Riddick, Wallace had no children of his own and viewed him as the son he never had. Riddick claims that in 1977, Wallace spoke to him of future plans to sell the property, whereupon Riddick expressed an interest in buying the property himself. Riddick states that Wallace agreed to sell the entire 500 acre tract to him at a later unspecified date and that the underlying consideration for this promise to sell was Riddick's performance of personal services. [3] Additionally, Riddick claims to have purchased, at Wallace's request, 160 acres of land across the river from the park "to protect and preserve the Park's beauty and sanctity." [4]

2 Riddick's great grandfather was Wallace's grandfather.

3 Riddick claims he performed a myriad of services for Wallace, including: rewiring the park's outside lights; developing an inner tube concession; hiring labor for building projects; cleaning and maintaining septic tanks; fencing the property; irrigation; hay baling, farming and cattle working; grading of roads; building a beam to protect the waterfront; and, repairing, maintaining, and purchasing farm equipment.

4 It is unclear from the record when this transaction took place.

In 1991, Wallace contracted to sell 400 of the approximately 500 acres in the park to Claude E. Arnold, an unrelated third party. Riddick, who is a lawyer, admits that he assisted Wallace in "properly document[ing] the sale"; but, after Arnold defaulted, Riddick contends he threatened Wallace with legal action if he did not live up to his promise to sell him the property. Riddick claims that in exchange for his

promise not to sue, Wallace and his wife, Sibyl, agreed to bequeath Riddick an undivided one-half interest in 100 acres, rather than selling him the entire 500 acres as previously promised.[5] Indeed, in 1993, Wallace and his wife provided Riddick with a copy of their newly executed mutual wills wherein they devised to Riddick an undivided one-half interest in 100 acres.

5 Wallace planned to sell 400 acres and to continue living on the remaining 100 acres. According to the 1993 will, upon Wallace's death, Riddick would receive an undivided one-half share in the 100 acres.

Wallace died on October 12, 2001, and on December 3, 2001, his widow, Sibyl, filed an Application to Probate the Last Will and Testament of Willard Wallace and for Letters Testamentary. The will offered for probate, however, was not the 1993 will that left Riddick an undivided one-half interest in the 100 acres, but rather, a 1996 will that completely excluded Riddick from receiving any interest in the estate.[6] In response, Riddick filed an Opposition to Probate of Will and to Issuance of Letters Testamentary, claiming undue influence. On February 14, 2002, the trial court admitted the 1996 will to probate and authorized the letters testamentary. Riddick did not appeal this order but instead brought this suit. During a three year period, the following petitions and dispositive motions were filed and heard:

6 The 1996 will stated that the Wallaces had recently entered into an earnest money contract to sell 400 acres to Fred Wallace and his wife, while the remaining 100 acres, containing Willard and Sibyl's homestead, were to be left to the surviving spouse.

***2** June 24, 2002 Plaintiff's Original Petition, which alleged breach of contract and sought the imposition of a constructive trust upon the property allegedly promised to Riddick;

January 27, 2004 Defendant's Motion for Summary Judgment, which argued that Riddick's claims were barred as a matter of law and public policy pursuant to § 59A of the Probate Code;

May 6, 2004 Plaintiff's First Amended Petition, which continued to assert breach of contract, but added a claim of promissory estoppel, and alternatively, breach of fiduciary duties;

July 7, 2004 Plaintiff's Second Amended Petition, which discarded his cause of action for breach of contract and instead, plead fiduciary relationship or alternatively, a relationship of special trust and confidence, unjust enrichment, and constructive trust;

September 17, 2004 Defendants' Amended Motion for Summary Judgment, which argued that there was no legal contract to make a will and no fiduciary relationship;

April 26, 2005 Trial court's order, granting partial summary judgment, dismissing all of Plaintiff's causes of action with the exception of unjust enrichment, which the court found the defendant had not addressed in its amended motion;

May 6, 2005 Defendants' Motion for Final Summary Judgment, which addressed the issue of unjust enrichment;

June 17, 2005 Plaintiff's Third Amended Petition, which alleged unjust enrichment and constructive trust; and,

July 13, 2005 Trial court's order which granted Defendants' Motion for Final Summary Judgment.

Riddick now brings this appeal, raising the following issues: the trial court erred in granting the Final Summary Judgment and dismissing Riddick's claim for unjust enrichment without affording him an opportunity to replead; and, the trial court erred in granting summary judgment because there was an issue of material fact regarding whether a fiduciary relationship existed between Riddick and Wallace "sufficient to support the imposition of a constructive trust."

STANDARD OF REVIEW

To obtain a traditional summary judgment, a party moving for summary judgment must show that no genuine issue of material fact exists and that the party is entitled to judgment as a matter of law. TEX.R. CIV. P. 166a (c); *Randall's Food Mkts., Inc. v. Johnson,* 891 S.W.2d 640, 644 (Tex.1995); *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548 (Tex.1985). In reviewing the grant of a summary judgment, we must indulge every reasonable inference and resolve any doubts in favor of the respondent. *Johnson,* 891 S.W.2d at 644; *Nixon,* 690 S.W.2d at 549. In addition, we must assume all evidence favorable to the respondent is true. *Johnson,* 891 S.W.2d at 644; *Nixon,* 690 S.W.2d at 548-49. A defendant is entitled to summary judgment if the evidence disproves as a matter of law at least one element of the plaintiff's cause of action. *Lear Siegler, Inc. v. Perez,* 819 S.W.2d 470, 471 (Tex.1991). Once the movant has established a right to summary judgment, the burden shifts to the respondent to present evidence that would raise a genuine issue of material fact. *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 (Tex.1979). When the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm the judgment if any of the theories raised in the motion for summary judgment are meritorious. *See State Farm Fire & Cas. Co. v. S.S.,* 858 S.W.2d 374, 380 (Tex.1993).

***3** Under Rule 166a (i), a party may move for a no-evidence summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX.R. CIV. P. 166a (i). We review a no-evidence summary judgment de novo by construing the record in the light most favorable to the respondent and disregarding all contrary evidence and inferences. *Merrell Dow Pharm., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex.1997); *Reynosa v. Huff,* 21 S.W.3d 510, 512 (Tex.App.-San Antonio 2000, no pet.); *Moore v. K Mart Corp.,* 981 S.W.2d 266, 269 (Tex.App.-San Antonio 1998, pet. denied). A no-evidence summary judgment is improperly granted when the respondent brings forth more than a scintilla of probative evidence that raises a genuine issue of material fact on the challenged elements. TEX.R. CIV. P. 166a (i); *Gomez v. Tri City Cmty. Hosp., Ltd.,* 4 S.W.3d 281, 283 (Tex.App.-San Antonio 1999, no pet.). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact, and the legal effect is that there is no evidence. *Kindred v. Con/Chem, Inc.,* 650 S.W.2d 61, 63 (Tex.1983).

UNJUST ENRICHMENT

Unjust enrichment occurs when a person obtains a "benefit from another by fraud, duress, or the taking of an undue advantage." *Villarreal v. Grant Geophysical, Inc.,* 136 S.W.3d 265, 270 (Tex.App.-San Antonio 2004, pet. denied) (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi,* 832 S.W.2d 39, 41 (Tex.1992)). It is an equitable rule providing a remedy for one who has conferred benefits upon another who has received those benefits unjustly. *Id* . Unjust enrichment occurs when "the person sought to be charged [has] wrongfully secured a benefit or [has] passively received one which it would [be] unconscionable to retain." *City of Corpus v. S.S. Smith & Sons Masonry, Inc.,* 736 S.W.2d 247, 250 (Tex.App.-Corpus Christi 1987, writ denied). Because the doctrine of unjust enrichment is premised on restitution, the underlying purpose is to place "an aggrieved plaintiff in the position he occupied prior to his dealings with the defendant." *Burlington N. R.R. v. Southwestern Elec. Power Co.,* 925 S.W.2d 92, 97 (Tex.App.-Texarkana 1996), *aff'd,* 966 S.W.2d 467 (Tex.1998). Further, restitution has been defined as the "[r]eturn or restoration of some specific thing to its rightful owner or status." *Black's Law Dictionary* 1339 (8th ed.2004). It is "[a] body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment." *Id.*

"Unjust enrichment is not a proper remedy merely because it 'might appear expedient or generally fair that some recompense be afforded for an unfortunate loss' to the claimant, or because the benefits to the person sought to be charged amount to a windfall." *Heldenfels,* 832 S.W.2d at 42 (quoting *Austin v. Duval,* 735 S.W.2d 647, 649 (Tex.App.-Austin 1987, writ denied)).

***4** Riddick initially brought suit claiming that Wallace breached an oral agreement to devise him an undivided one-half interest in 100 acres. However,

section 59A (a) and (b) of the Texas Probate Code, which was enacted in 1979, provides that:

> (a) A contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract.
>
> (b) The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract.

TEX. PROB.CODE ANN. § 59A (Vernon Supp.2006).[7] Prior to the enactment of § 59A, contractual wills were considered "litigation breeders" and this statute was passed in an attempt to eradicate some of the litigation resulting from both contractual wills and contracts concerning succession. Ozgur K. Bayazitoglu, *Applying Realist Statutory Interpretation To Texas Probate Code § 59A-Contracts Concerning Succession*, 33 HOUS. L.REV. 1175, 1185-86 (1996) (discussing the history and development of 59A).[8]

7 Although later amended, this is the statute in effect at the time suit was filed.

8 Given the scant number of cases filed after 1979 involving the enforcement, either in equity or at law, of an oral agreement to make a will, it would appear that the legislature was successful in this endeavor. *See, e.g., Hearn v. Hearn*, 101 S.W.3d 657, 660 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (legislative intent of § 59A clearly establishes that extrinsic evidence cannot be considered in determining whether a contractual will exists); *Stephens v. Stephens*, 877 S.W.2d 801, 804 (Tex.App.-Waco 1994, writ denied)(making a contractual will pursuant to § 59 does not remove right of party to revoke it); *Taylor v. Johnson*, 677 S.W.2d 680, 682 (Tex.App.-Eastland 1984, writ ref'd n.r.e.) (holding that the oral agreement was not probative evidence of a contract to make a will pursuant to § 59A).

On appeal, Riddick concedes that although § 59A of the probate code bars him from maintaining a breach of contract claim he is, nevertheless, entitled to enforce the oral agreement between himself and the decedent and recover either the deed to the undivided one-half interest in the 100 acre tract, or its equivalent value, based solely on equity. Riddick argues that the trial court erred in granting the Motion for Final Summary Judgment wherein the estate contended that Riddick's claim for unjust enrichment was barred as a matter of law because § 59A bars the enforcement of the oral agreement to make a will and, therefore, Riddick was not entitled to the relief requested.[9]

9 Riddick contends in his first issue that the trial court erred in granting both the amended summary judgment and the final summary judgment. However, the amended summary judgment addressed the issues of a contractual claim, which Riddick concedes he is barred from making, and the claim for breach of a fiduciary relationship, which we address last in this opinion. The final summary judgment addressed the remaining issue of unjust enrichment, which Riddick presents as his second issue and which we have addressed in this opinion as Riddick's first issue.

Riddick cites to several cases in support of his position that "an action for unjust enrichment is proper where there is no contract or when a contract is unenforceable or void for other reasons." *See, e.g., Conoco, Inc. v. Fortune Prods. Co.*, 35 S.W.3d 23, 28 (Tex.App.-Houston [1st Dist.] 1998), *aff'd and rev'd in part on other grounds*, 52 S.W.3d 671 (Tex.2000) (involving action by natural gas sellers to recover for fraud in the inducement and unjust enrichment in sale of field liquids); *R. Conrad Moore & Assoc. v. Lerma*, 946 S.W.2d 90, 97 (Tex.App.-El Paso 1997, writ denied) (involving a suit for return of earnest money after purchaser was unable to obtain financing); *Burlington*, 925 S.W.2d at 97 (involving suit against a railroad for alleged overcharges under coal transportation contracts); *City of Harker Heights v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313, 319 (Tex.App.-Austin 1992, no writ) (involving an alleged breach of contract by city). However, while unjust enrichment may be an appropriate remedy when a contract is invalid or otherwise enforceable, unjust enrichment does not provide for enforcement of the contract but rather, for restitution of benefits unjustly conferred. *Villarreal*, 136 S.W.3d at 270 (holding that unjust enrichment provides that one who receives benefits unjustly should make restitution for *those benefits*).

***5** Unjust enrichment is an equitable remedy that places an aggrieved plaintiff in the position he occupied prior to his dealings with the defendant. *Burlington,* 925 S.W.2d at 97. This remedy is distinct from expectancy damages that allow a plaintiff to receive the benefit of the bargain by placing him in as good a position as he would have been had the contract been performed. *Hart v. Moore,* 952 S.W.2d 90, 97 (Tex.App.-Amarillo 1997, writ denied). Here, Riddick claims he performed various services that benefitted Wallace. He does not, however, seek to be placed in the position he occupied prior to his dealings with Wallace by recovering the value of the services performed. [10] Instead, he has consistently maintained that he should receive the property promised to him because "an agreement implied in law under principles of equity arose compelling delivery of the contested tract to Plaintiff." To hold otherwise, Riddick argues, would result in Wallace's estate being unjustly enriched by having received benefits for which compensation was promised to Plaintiff but not delivered. However, equitable relief is not available merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall. *Burlington,* 925 S.W.2d at 97 (citing *Heldenfels,* 832 S.W.2d at 42).

10 Riddick admits he can not provide any receipts or other documentation reflecting the value of the services performed and further, has never attempted to place a value on these services. Moreover, counsel for Riddick stated at the hearing on the motion for final summary judgment that Riddick had no intention of seeking restitution for the value of labor performed or materials furnished.

Riddick, as a matter of law, cannot recover expectancy damages which are only available pursuant to a contract. [11] *See id.* Accordingly, we overrule Riddick's first issue.

11 Riddick further sought to recover title to the property under a constructive trust theory; however, this equitable remedy is also unavailable to Riddick given our conclusion, addressed subsequently in this opinion, that there was no evidence of a confidential/fiduciary relationship between the parties. *See Stout v. Clayton,* 674 S.W.2d 821, 823 (Tex.App.-San Antonio 1984, writ ref'd n.r.e.).

In his second issue, Riddick argues that rather than granting summary judgment on Riddick's claim for unjust enrichment, the trial court should have afforded Riddick the opportunity to replead. While the general rule is that summary judgments should not be used to attack a deficiency in the opposing party's pleading, *In re B.I.V.,* 870 S.W.2d 12, 13 (Tex.1994), summary judgment may be appropriate when the pleading deficiency cannot be cured. *Friesenhahn v. Ryan,* 960 S.W.2d 656, 658 (Tex.1998). Thus, if the pleadings show that the plaintiff has no viable cause of action, summary judgment is proper. *See id.*

The record reflects that, before the trial court's July 13, 2005 final order granting summary judgment, Riddick filed four petitions, with Plaintiff's Third Amended Petition and Plaintiff's Response to the Motion for Final Summary Judgment being filed on June 17, 2005. In each of his pleadings, Riddick sought an interest in the property, or the value thereof, that formed the basis of the alleged oral agreement between the deceased and Riddick based on unjust enrichment. Given our prior conclusion that Riddick was not entitled to the equitable relief requested, and that this is the exclusive relief he has ever sought or continues to seek, summary judgment was proper in this instance. *Id.* Riddick's second issue is overruled.

***6** In his final issue, Riddick claims there was an issue of material fact with respect to the existence and breach of "an informal fiduciary/ confidential relationship" between him and the decedent. Specifically, Riddick argues that "based on the close personal relationship" and the promises allegedly made to Riddick by Wallace, there existed a fiduciary relationship, or alternatively, a relationship of special trust and confidence that compelled each to act in "a manner exhibiting the highest degree of loyalty and fair dealing." We disagree.

FIDUCIARY RELATIONSHIP

In *Meyer v. Cathey,* 167 S.W.3d 327, 331 (Tex.2005) (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.,* 964 S.W.2d 276, 287 (Tex.1998)), the court stated

that "an informal fiduciary duty ... arises from 'a moral, social, domestic or purely personal relationship of trust and confidence.' " However, the court in *Cathey* went on to caution that informal fiduciary relationships are not created lightly. *Id.* Further, the court emphasized that "[i]t is well settled that 'not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.' " *Id.* (quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176-77 (Tex.1997)). A fiduciary duty may arise as a result of dominance on the part of one or weakness on the part of another. *See id.; Associated Indem. Corp.*, 964 S.W.2d at 287. The determination of whether a fiduciary duty exists or has been breached is a question of law where the underlying facts are not in dispute. *See Cathey*, 167 S.W.3d at 331 (holding that there was insufficient evidence of a fiduciary relationship despite Cathey's assertions that he trusted Meyer in a business matter and had a close personal friendship with him). Before an informal fiduciary duty in a business transaction will be imposed, it must be established that the special relationship of trust and confidence existed prior to, and separate from, the agreement made the basis of the suit. *Id.* Further, subjective trust alone will not create a fiduciary relationship; instead the nature of the relationship must be established from objective facts. *See id.; Trostle v. Trostle*, 77 S.W.3d 908, 914 (Tex.App.-Amarillo 2002, no pet.).

The estate asserted in its amended motion for summary judgment that there was no evidence of a fiduciary relationship between the decedent and Riddick and further, that there was no fiduciary obligation between the parties as a matter of law. Riddick responded to the estate's motion by arguing that his deposition testimony and affidavit, along with the affidavit of Jess Mayfield, created a question of material fact regarding the existence of a fiduciary relationship between Riddick and the deceased. [12]

12 The estate's objections to the affidavits of Riddick and Mayfield were sustained, whereupon the trial court granted partial summary judgment, thereby dismissing the claim for breach of fiduciary duty. On appeal, Riddick does not complain that the trial court erred in granting these objections. *See Cmty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 281 (Tex.App.-El Paso 2004, no pet.).

We review a no-evidence summary judgment de novo by construing the record in the light most favorable to the respondent. *Havner*, 953 S.W.2d at 711; *Reynosa*, 21 S.W.3d at 512. In doing so, the record reflects that Riddick and the deceased were distant relatives; that Riddick performed various personal and legal services for Wallace pertaining to the property in question, including providing legal advice and representation, as well as maintaining and improving the property; that Riddick stated Wallace promised to sell him the entire tract but instead, in the early 1990's, Wallace sold 400 acres to Arnold; that Riddick, despite learning of this betrayal continued to provide personal and legal services to Wallace, including documenting the conveyance, as well as the reconveyance, of the property following Arnold's default; that according to Riddick, after reacquiring the property and upon being threatened with suit, Wallace agreed to give Riddick an undivided one-half interest in 100 acres which Wallace subsequently bequeathed to Riddick in a will made jointly with his wife, Sibyl in 1993; that in the summer of 1995, Willard promised to give Riddick his half of the park and sell him Sibyl's half for $400,000; that in 1996, Wallace instead sold the 400 acres to Fred Wallace, a relative; that Riddick learned of this sale from his wife and became very upset, resulting in his visits to Wallace diminishing greatly; and, that without notice to Riddick, Willard and Sibyl Wallace revoked their 1993 wills and executed new wills in 1996, omitting any mention of Riddick as a beneficiary.

***7** Riddick asserts that these facts somehow reflect "a moral, social, domestic or purely personal relationship of trust and confidence" and are sufficient to raise a genuine issue of material fact regarding the existence of a fiduciary duty owed by Wallace to Riddick. However, notwithstanding Riddick's assertions that he and the deceased "had a close personal relationship," " 'the fact that the relationship has been a cordial one, of long duration, [is not] evidence of a confidential relationship.' " *Cathey*, 167 S.W.3d at 331 (quoting *Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591, 595 (Tex.1992). Riddick also points to the 1993 will as evidence that he trusted Willard and Sibyl Wallace and relied on their representation that they would devise an undivided one-half interest in the 100 acres to him; however, this

too is insufficient to create a fiduciary relationship. *See id.* at 330 (explaining that not every relationship involving trust and confidence rises to the level of a fiduciary relationship). Moreover, it is well settled that before an informal fiduciary duty in a business transaction will be found to have existed, it must be shown that the special relationship of trust and confidence existed prior to, and apart from, the agreement made the basis of the suit. *Id.; Associated Indem. Corp.*, 964 S.W.2d at 287. Here, although Riddick claims he relied on Wallace's assurance that he would sell or devise the property to him, Riddick did not present any evidence of a special relationship of trust and confidence which existed prior to, and apart from, the agreement made the basis of this suit. *See Havner*, 953 S.W.2d at 711; *Associated Indem. Corp.*, 964 S.W.2d at 287. Instead, Riddick presents his subjective belief, unsupported by objective facts, that he trusted Wallace to act in "a manner exhibiting the highest degree of loyalty and fair dealing." *See Trostle*, 77 S.W.3d at 914. In sum, the evidence presented by Riddick to support his claim of an informal fiduciary/confidential relationship is "so weak as to do no more than create a mere surmise or suspicion" and amounts to less than a scintilla of evidence. *Kindred*, 650 S.W.2d at 63.

The estate further argues that there was no fiduciary duty owed by Wallace to Riddick as a matter of law given Riddick's admission that he both represented and provided legal advice to Wallace throughout the years regarding the property in question. [13] Riddick denies that his role in providing legal advice to Wallace "on an irregular and infrequent basis over the course of a decades-long relationship" resulted in an attorney-client relationship between him and Wallace; nevertheless, Riddick testified as follows:

> Q. (By Mr. Drought) All right. Okay. Let's go back to the legal work that you were doing for Mr. Wallace. What-other than the two things that you've mentioned, what other legal work did you do for him that you can recall?
>
> ***8** A. [by Riddick] Well, I was on 24-hour call if he had any kind of problem, because I had a law background ...

Thus Riddick's admission that he was on call to provide legal advice and services to Wallace on a 24-hour basis, in addition to the legal services admittedly performed and set forth in footnote 13 of this opinion, clearly indicates an attorney client relationship, thereby obviating any finding that Wallace owed a fiduciary duty to Riddick. *Cathey*, 167 S.W.3d at 330 (holding that an attorney-client relationship establishes a fiduciary duty, as a matter of law, from the attorney to the client). Riddick's third issue is overruled.

13 Although Riddick claims he did not actively practice law during the times relevant to the events in this lawsuit, he states in his brief that over the years he assisted Wallace by:

a. "mediating the resolution of a gun-toting fence dispute between Wallace and his neighbor Elmo Jones over Jones's cattle crossing Wallace['s] property to water at the river";
b. "facilitating the redrafting of the Contract for Deed between Wallace and Arnold";
c. "easing the eventual repossession of the Park after Arnold defaulted";
d. "appearing at administrative hearings in front of the Nueces River Water Authority to establish Wallace's water rights";
e. "aiding, at Wallace's direction and insistence, the reacquisition by Wallace and Defendant Sibyl Wallace of a four-acre tract of land previously deeded to Sibyl's daughter and son-in-law to preclude the sale of the property to a third party as the daughter and son-inlawn [sic] divorced by reimbursing the daughter for their expenditures installing electricity, propane, and a well on the property";
f. "advising Wallace whether to pay attorney's fees that he questioned as excessive from litigation over the Park in the early #70's between Wallace and his brothers and sisters";
g. "responding to an accident caused by Wallace's cows getting out on the highway and obtaining liability insurance for Wallace where he previously had none";
h. "resolving Wallace's concern regarding his potential liability when one of his [sic] workers fell off a ladder"; and
i. "advising Wallace on structuring his will to accomplish his desired purpose."

CONCLUSION	Accordingly, we affirm the trial court's order granting summary judgment in favor of the estate.

End of Document © 2013 Thomson Reuters. No claim to original U.S. Government Works.